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Supreme Court Of The United States

October Term, 1974
No. 74-1019

ANTHONY JOSEPH GARGOTTO - **Petitioner**

vs.

UNITED STATES OF AMERICA - **Respondent**

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SIXTH CIRCUIT

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The Petitioner, Anthony Joseph Gargotto, respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Sixth Circuit affirming the conviction of the Petitioner by the United States District Court for the Western District of Kentucky at Louisville, Kentucky.

OPINIONS BELOW

The District Court rendered no written opinion in this case. The opinion of the Sixth Circuit Court of Appeals in response to the first appeal in this case was reported at 476 F.2d 1009 (6th Cir. 1973) (Appendix A). The second appeal to the Sixth Circuit from the remand pursuant to the first appeal has not been officially

reported but is contained in the Appendix. The denial of the motion for rehearing by Petitioner appears also in the Appendix.

JURISDICTION

The Judgment of the District Court for the Western District of Kentucky was entered on July 20, 1972. The Sixth Circuit remanded the case for further determination on April 24, 1973 in 476 F.2d 1009. Pursuant to the remand, the District Court made its findings and ruled accordingly. This ruling was appealed by Petitioner but the Circuit Court affirmed on November 19, 1974. A Petition for Rehearing was denied on January 15, 1975. The jurisdiction for the Court is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

I. Whether the records of the Petitioner seized at his place of business were within the "plain view" exception to the Fourth Amendment.

II. Whether the seizure of Petitioner's records at police headquarters two days later was valid under the Fourth Amendment.

III. Whether the records of Petitioner were testimonial and thus barred at his trial by the Fifth Amendment.

STATEMENT OF THE CASE

The Petitioner was the owner of a building in Louisville, Kentucky, that caught fire on March 22, 1969. A fire captain at the scene suspected arson and summoned Captain William Foushee of the arson squad from his home. When Captain Foushee arrived at the

scene, the fire had already been extinguished. (Appendix 25a). Detective John Aubrey of the Louisville Police Department had earlier passed by the scene of the fire and had returned to the scene out of curiosity. Captain Foushee decided to enter the building in search of evidence of arson and requested Detective Aubrey to accompany him.

Captain Foushee said that when he entered the building to make an inspection, he noticed evidence that a flammable fluid or accelerant had been used on the stairway and the landing at the top of the stairway (Appendix 26a). According to Foushee, the second floor consisted of an outside hallway leading to an office in the front of the building which connected to a larger room in the rear.

Upon entering the office room, his examination revealed that there were a number of papers on the floor and in file cabinets. He stated that there was no evidence of any accelerant having been applied to any of the area in the office. He and Aubrey gathered up these documents in the office using a fire coat as a container. It is important to emphasize that the material they seized came from the floor, the file cabinets and desk drawers.

The larger room to the rear of the second floor was also searched by the men, but no evidence of accelerants or flammable fluids was found. Papers and similar material found in this room were placed in the same fire coat along with the material seized in the front office.

Proceeding to the third floor, the officers conducted the same procedure as in the other rooms. Documents found in this room were placed with those previously seized in the other rooms in the fire coat. As with the

other rooms, no accelerant or flammable liquid was found in this room.

Foushee stated that he did not have time to examine any of the documents he removed from the building, so he removed them not to the fire department but to the police department. The records were left in Detective Aubrey's office while Foushee returned to the scene and Aubrey went elsewhere. Foushee never did examine the records in connection with the arson investigation because an arrest was made that same day. Aubrey thought the documents were gambling records, but he admitted that he could not tell just by looking at them whether any crime had been committed (Appendix (51a, 55a).

The next day, Sunday, March 23, 1969, Detective Aubrey called Special Agent Coots of the Internal Revenue Service and advised him that he (Aubrey) had these documents. Aubrey advised Coots that Coots should ask Foushee if the Internal Revenue Service could inspect and copy the documents. The next day, Monday, Coots called Foushee and received permission to inspect them. Foushee expressed no objection, whereupon Agents Coots and Brutcher proceeded to inspect and copy every piece of paper with a copying machine.

Approximately a week after the fire, Foushee took the documents to the office of the Commonwealth's Attorney for the State of Kentucky in Louisville. No state prosecution was ever brought based on these documents.

From the Petitioner's records illegally "seized" from the police department, a criminal tax investigation arose which subsequently led to the Petitioner's indictment for evasion of federal gambling taxes. Petitioner

was subsequently tried on a charge of violation of 26 U.S.C. §7201 "Attempt to Evade or Defeat Tax" because he had not paid the excise tax on gambling activities required by 26 U.S.C. §4401(a). A timely motion to suppress was filed but was overruled prior to the trial. After a jury trial, Petitioner was found guilty of fifteen counts of violations of 26 U.S.C. §7201 on July 12, 1972. Sentence was fixed at five years on each count to run concurrently for a total sentence of five years.

The judgment was appealed to the Sixth Circuit. That court held that the evidence used against Petitioner was validly seized and usable at his trial only if the exigencies of the situation justified the extension of the search into desk drawers and cabinets. If that question was answered negatively, then a further determination as to the possibility of segregating such documents from those which were in "plain view" was ordered.

Upon remand, an evidentiary hearing was held. The District Judge found that the exigencies of the situation warranted an extension of the serach into the drawers and cabinets. This finding was appealed to the Sixth Circuit. That court affirmed the findings of the District Court. Petitioner's request for a rehearing was denied on January 15, 1975.

It is from both of these denials by the Sixth Circuit that Petitioner now prays that a Writ of Certiorari be issued.

REASONS FOR GRANTING THE WRIT

I. The Records seized at the Petitioner's place of business were not within the "plain view" exception to the Fourth Amendment.

In view of the fact that the disposition of this case depends upon the application of the "plain view" exception to the requirement of the Fourth Amendment, it is necessary to list the elements of that exception. The case of *Coolidge* v. *New Hampshire,* 403 U.S. 443 (1971) provides the basic law on this exception. The Court held that the history of prior cases established the plain view exception *only upon certain conditions.* As stated on page 466:

> "What the 'plain view' cases have in common is that the police officer in each of them had a prior justification for an intrusion in the course of which he came inadvertently across a piece of evidence incriminating the accused."

Thus, there are three basic requirements of the plain view exception: a right to be there; an inadvertent discovery; and, discovery of incriminating evidence.

The Sixth Circuit has characterized the seizure of the records in this case as within the "plain view" exception to the requirement of a warrant under the Fourth Amendment. The reasoning was, apparently, that Foushee had been provided with enough evidence of arson upon entering the building that a further search for evidence of arson was justified under the circumstances without a warrant.

> "We believe there was sufficient evidence of arson to establish probable cause for a further search when viewed by a 'man of reasonable caution' or a

> 'man of prudence and caution.' *Carroll* v. *United States,* 267 U.S. 132, 161 (1925). Furthermore, the fact that the fire had been so recently extinguished and the firemen were still working in the area where the records were found was an 'exigency' which completed the justification for proceeding to search without a warrant. *Coolidge* v. *New Hampshire, supra,* at 463-64."

From this, the court reasoned that the officers while "pursuing their investigation of the cause or origin of the fire" noticed papers lying around on the floors in the various rooms. These papers were held to fit within the "plain view" exception of *Coolidge* v. *New Hampshire,* 403 U.S. 443 (1971). The reasons for this conclusion were as follows at 476 F.2d at page 1013:

> "In *Coolidge* v. *NewHampshire, supra,* the requirements for a valid seizure of evidence in plain view without a warrant were set forth. The first requirement is that the officers' 'initial intrusion' be justified. This requirement has been met in the present case, as we have held that the officers had probable cause to enter pursuant to the statute, and to search for evidence of arson under the exigencies of the situation. The second requirement is that the discovery of the evidence in plain view must be '*inadvertent.*' Since the investigators had no prior knowledge of the location of the gambling records in appellant's building, their discovery was an inadvertent result of the lawful search for evidence of arson. It was not a 'planned' warrantless search. (Emphasis added)

A brief review of the facts and the applicable law will disclose that this analysis is incorrect.

It is clear from the testimony that Captain Foushee directed the seizure of the records involved. Foushee

directed Detective Aubrey specifically as to what documents to confiscate; Aubrey collecting none on his own initiative (Appendix 53a). Foushee was looking for evidence of the crime of arson, as has always been conceded; likewise, he was not looking for evidence in connection with any other crime. Foushee was not just walking through the building checking on the progress of the firemen when he discovered the papers in the various rooms. He was looking for just those type of papers as he testified that frequently a motive for arson could be established from such papers. (Appendix 24a). Thus, he did not "inadvertently" stumble upon any of these papers. He was, by his own testimony, looking for material of precisely that nature.

The Sixth Circuit speaks of the term "inadvertent" in reference to the discovery of the "gambling records" of the Petitioner as though such records were separate from the evidence of arson. The documents were one and the same. Thus, clearly, they were not discovered as the result of an "inadvertent" discovery. The seizure of these documents was based upon the belief that within the documents some evidence of a motive for arson might be found. The search was indeed a "planned" warrantless search, justified only by the exigencies of the situation. The fact that file cabinets and desk drawers were rifled during the seizure surely exposes the patent inapplicability of the inadvertent discovery rationale. For the court to label the documents "gambling records" assumes something that neither officer at the scene was aware of and certainly was not the reason they were seized.

In this regard, it is apparent that the court completely omitted one of the requirements under *Coolidge* for

the application of the plain view exception; namely, that the evidence inadvertently discovered must have been incriminating to the defendant. The incriminating nature of the documents was not immediately apparent to the officers at the scene. Captain Foushee had no idea what type of records they were. Detective Aubrey testified that, although he thought they "appeared to be gambling records", he could not tell from the face of the records whether any crime had been committed. He further admitted that he never disclosed his suspicion to Foushee and, even more important, he never picked up any paper for any purpose other than to aid in the arson investigation (Appendix 54a).

To hold that such material was incriminating on its face in such circumstances is contrary to both the facts as stated and the applicable law. In the *Coolidge* case, the Court referred favorably to the concurring opinion of Mr. Justice Stewart in *Stanley* v. *Georgia*, 394 U.S. 557 (1969) in commenting on the requirement of actual "evidence" being present for a plain view exception.

In *Stanley*, Georgia police officers had entered the defendant's home with a search warrant directed toward evidence of illegal gambling. While searching the drawers of a desk, the officers discovered moving picture films. These films were seized and the agents spent some fifty minutes exhibiting them by means of a projector set up in another room. The defendant was arrested on a charge of possession of obscene material. Although the majority founded its reversal of the charge on the right to privacy, Justice Stewart condemned the seizure of the films as being beyond the scope of the plain view exception.

> "This is not a case where agents in the course of a lawful search came upon contraband, criminal activity, or criminal evidence in plain view. For the record makes clear that the contents of the films could not be determined by mere inspection." (394 U.S. at p. 571)

As in *Stanley*, the records here were not evidence of illegal activity on their face; such a determination was not made until weeks later and only then when a full investigation was launched. Gambling records are not, per se, illegal or contraband. Thus, it is clear that the incriminating nature of the records could not be determined by the "mere inspection" of them at the scene. Indeed, Aubrey testified that he did hardly more than glance at these documents while picking them up and that he couldn't tell from the face of them whether any law had been broken.

In similar situations, the Sixth Circuit has ruled against the seizure of items under such circumstances with a later subsequent search. *United States* v. *Shye*, 473 F.2d 1061 (6th Cir. 1973); and, *United States* v. *Gray*, 484 F.2d 352 (6th Cir. 1973).

In *Shye*, the defendant was arrested in his apartment shortly after the commission of a bank robbery. Police officers searched the apartment and found a brown paper bag on a shelf in a bedroom closet. The bag contained money apparently stolen in the robbery. The discovery was justified by the Government on two grounds; search incident to arrest and "plain view". The court rejected the first argument on the grounds that the closet was not within the immediate control of defendant within the rule stated in *Chimel* v. *California*, 395 U.S. 752 (1969). The second argument was also rejected

because the bag was not incriminating and thus did not come within the plain view exception.

> "Completely without merit is the argument of the government that the sack of money was lawfully seized because it was in 'plain view' of the law enforcement agents. All that was in plain view was a plain brown bag, which did not itself constitute evidence, a fruit, or an instrumentality of the crime." 473 F.2d at p. 1066.

The situation in the *Gray* case is even more applicable. The police had obtained a warrant authorizing the seizure of alcoholic beverages from defendant Gray's store. While searching the second floor of the building an officer noticed two rifles in a closet. The officer copied the serial numbers of the rifles which the court characterized as a "seizure". The serial numbers were checked through computers and the rifles were determined to have been stolen. That same day the defendant was arrested in connection with the stolen guns. Examining the law here (as was done in *Shye*) under the *Coolidge* case, the court held that the plain view exception did not apply. Although the initial intrusion was justified, and the discovery of the rifles was inadvertent, since the rifles were themselves not incriminating the plain view exception requirements were not met.

> "Here, Officer Brodt inadvertnetly [sic] discovered the rifles in the upstairs closet while searching for alcoholic beverages but it was not 'immediately apparent' that the rifles were 'evidence incriminating the accused.' The rifles were not contraband; there was no nexus between the rifles and the crimes of selling or possessing intoxicating liquor without a license; nor did the officers at that time have any

> knowledge that the rifles were evidence of any other crimes. It was only after Trooper Brodt had seized the weapons, copied down the serial numbers, left the defendant's premises, and then run the information taken off the rifles through the National Crime Information Center that he learned that they were stolen and hence incriminating. This can hardly be characterized as being 'immediately apparent.' 484 F.2d at p. 355.

The court thus held that the second warrant, for seizure of the guns, was thus impermissibly tainted by the initial seizure of the weapons. It is important to note that the "seizure" in this case consisted of the officer carrying the rifles from one room to another and copying down the serial numbers. The rifles were not taken from the house, yet the court found the seizure complete. It is also important to note that the court cited the concurring opinion of Justice Stewart in *Stanley* v. *Georgia, supra,* as supporting its rationale.

An examination of the case at bar with the *Gray* case reveals almost the same issue. Here, as in *Gray,* the initial intrusion was justified. Although Petitioner concedes that the discovery of the records was hardly inadvertent, assuming *arguendo* that this was so, it is nonetheless clear that the evidence was not immediately apparent to the officers as incriminating the defendant. Indeed, the records were not found to be incriminating until a full scale investigation was undertaken by the Internal Revenue Service some weeks later. The officer in *Gray* undoubtedly was relying upon his experience in deciding to check the registration numbers off the guns. It must be remembered that the records were seized *only*

at Captain Foushee's direction and *only* because Foushee felt they might contain evidence of the crime of arson. Detective Aubrey did not pick up any papers except by direction of Foushee. At no time did Aubrey advise Foushee as to his suspicions about the nature of the records. In both cases the seizure was made and only later were the items determined to be evidence of an incriminating nature.

Thus, under the *Coolidge* test, the seizure of these items under the plain view exception to the requirement of a warrant cannot be justified. The discovery of the documents was a calculated attempt by the officers to preserve evidence of arson. It was clearly not "inadvertent" that the records were seized. Equally clear is the fact that such documents were not at the time of their seizure incriminating evidence immediately apparent to the officers. Furthermore it is obvious that the seizure by the Internal Revenue Service was not "inadvertent" and the testimony revealed that the records were not "incriminating" when the agents first examined them. Under either the initial or subsequent seizure, it is thus clear that the plain view exception does not apply.

Such evidence should have been suppressed, and, under *Wong Sun* v. *United States*, 371 U.S. 471 (1963), the taint should prevent any prosecution.

II. The seizure by Internal Revenue Agents of the documents while at police headquarters two days later was invalid under the Fourth Amendment.

Upon seizing the documents in question, the men transported them to the Louisville police station and

placed them in a locked room. Captain Foushee never did return to examine them. Neither did Detective Aubrey. Instead, the next day, Detective Aubrey called Special Agent Coots of the Internal Revenue Service and advised Coots of the events of the previous day. Aubrey told Coots he (Coots) "may be interested' in looking at the records. Two days after the fire Coots talked to Foushee in order to get permission to examine the documents, since the arson investigation by Foushe was the *only* rationale for their seizure. Foushee granted this permission and the Special Agents proceeded to copy every single document—without any regard to their potential incriminating effect. It is important to note that even when the Agents first examined the records, they could not determine whether any federal law had been broken. By Agent Coots' testimony, it would have been impossible to detect any crimes without the defendant's tax returns. He also testified that there was no particular federal offense against gambling that he was looking for since he had "no reason to know at that time that a violation had occurred." (Appendix 65a).

Thus, the records were, at most, suspected of having some incriminating effect while they were at police headquarters. Yet, on the basis of this suspicion, Detective Aubrey called the Internal Revenue Service rather than seeking a warrant. The Internal Revenue Service did not seek a warrant either. Yet, they searched and seized (photographed) all the records. There was no valid reason for not seeking a warrant at this stage and, indeed, no reason was offered for not having done so. Instead, the Sixth Circuit has relied on the absence of a request by the defendant for the return of the records as being determinative (476 F.2d at p. 1014). This rationale

was propounded in an effort to circumvent the decision in *United States* v. *Birrell*, 470 F.2d 113 (2d Cir. 1970).

That case held that, even though state officers had a right to examine items including papers seized from a murder victim's apartment, such papers that belonged to another person could not be examined by federal agents in connection with another purpose. Specifically, the Internal Revenue Service checked the papers for evidence of Birrell's financial capabilities in connection with his affidavit of poverty filed in another action. He was later charged with perjury. Although Birrell asked for the return of the document, such request was denied and the records were examined by the Internal Revenue Service five days after they were seized.

It is true that Birrell did make his claim to the papers before the federal agents were notified; however, it is also clear that such fact cannot be determinative of the issues in this case. For in *Birrell* the defendant, by whatever source, found out about the confiscation of his possessions and then asked for their return. Moreover, when the police seized the items, they had no idea it contained articles belonging to Birrell. Indeed, they obviously didn't even know who he was. In this case, the officers seized the documents from Petitioner's building, but did not inform the Petitioner of this action, even though they obviously knew whose records they had confiscated.

Perhaps the most obvious point about *Birrell* was that the evidence seized was at another person's house. Thus, the police assumed that items in the victim's house were the victim's property and not someone else's (470 F.2d at p. 116). The police were thus not aware that the items belonged to Mr. Birrell until he asked for them

at police headquarters. Ordinarily the evidence could have been examined by federal agents as they were all legally seized; but not for those items belonging to Mr. Birrell. The reason employed by the court was that the federal agents could not lawfully have searched the victim's room for the purpose of obtaining evidence against Birrell without a warrant. As the court stated at 470 F.2d p. 117:

> "We fail to see how the taking into custody by the city police, proper though we have held this to be, relieves federal authorities from a requirement that would have existed if Birrell's papers had been left where they were."

It was the fact that the police knew such items belonged to Birrell, not the point in time when he so informed them, that was crucial.

This situation at bar closely resembles that of the *Birrell* case in that here, as in *Birrell*, the police *knew* that the documents belonged to the Petitioner when they turned them over for inspection to the federal agents. It is true that Petitioner did not request their return until after the federal agents had examined the records, but that is completely irrelevant. The fact that the police *knew* whose records they were was the determining factor in *Birrell*. With that knowledge, the court ruled that Birrell's right to privacy required a search warrant before other agencies could inspect the items for evidence of a crime unrelated to the reason for the initial seizure.

To follow the reasoning employed by the Circuit Court, the police could have kept any such documents for an indefinite period until the Petitioner initiated a request for them. Although the "exigent circumstance-

were deemed severe enough to excuse the police from getting a warrant in the first place and holding the records for examination for an apparent indefinite time, such circumstances apparently do not apply to the Petitioner. Rather, he was required to somehow have knowledge that during a major fire on his business premises the police carted away records from certain rooms. In addition, he was required to assume that if the police had seized anything belonging to him they would not so inform him. He apparently was not to assume that the fire perhaps destroyed various papers.

On a more basic level, the Circuit Court's rationale reverses the impetus under the Fourth Amendment. The court conceded, 476 F.2d at p. 1012, that a warrantless search was *per se* unreasonable under the Fourth Amendment unless fitting within one of the "specifically established exceptions to this rule". Clearly, the burden is on the Government to justify a refusal to obtain the warrant. Surely this burden is not met by merely showing that a particular defendant had not asked for the return of seized items. The obvious implication of such reasoning would be that a person waives any Fourth Amendment right to be free of unreasonable searches and seizures unless he immediately protests to the police. For the defendant who may not know of such a seizure, it appears to be an insurmountable burden. There is an obvious element in the court's opinion of an "implied consent" to allow other agencies to conduct further investigations, etc., no matter that the defendant has not been informed of either the initial seizure or the subsequent one. How could the defendant have waived his right to refuse to allow the Internal Revenue Service to further examine his records if he didn't know

that they were going to examine them in the first place? How could the defendant have consented to an inspection of the records while at police headquarters by any agency if he did not know of their (records) location?

Clearly, the real question concerns the legality of a later inspection of the documents at the police station under any guise. In other words, could the same papers have been inspected, or "searched" in Fourth Amendment terms, without a warrant two days after their initial warrantless seizure? The answer to this question is clearly "no". Although exigent circumstances existed at the time of the seizure of the documents, no such circumstances existed two days later such that a search had to be conducted in absence of a warrant.

The testimony of both Foushee and Aubrey was that neither could tell whether the documents contained any evidence of arson at the time they were seized. The articles were transported to police headquarters simply for sake of "convenience" and were to be examined later for evidence of arson. Clearly, there is a dichotomy between the seizure and the search in this case.

It is obvious that had either the District Court or the Circuit Court found no exigent circumstances at the time of the fire, a warrant would have been required for any search and seizure conducted in the building. Under such warrant, the documents could have been seized and searched later much in a manner that was apparently envisioned by the officers here. Yet, precisely that situation has occurred here without a warrant. The federal officers were allowed to seize the documents (by copying them) and search them two days later for evidence unrelated to the reason for their initial seizure.

The Circuit Court found that "probable cause" for

the initial "search" (which was actually the seizure) of the documents in the building was provided by the evidence of arson previously discovered. Thus, presumably, this probable cause existed two days after the documents were seized but not yet searched, or inspected, pursuant to the seizure. Clearly, a warrant should have been required before the police could have examined the documents for evidence of arson two days later as the exigent circumstances surrounding their seizure had disappeared. What standard is to be applied to the search two days after the seizure when the object of the search is evidence of a different crime than arson? If a warrant would have been required in the first instance, why not the latter? As there was no probable cause to suspect revenue law violations, it is difficult to imagine the Internal Revenue Service having been able to obtain such a warrant. The records themselves did not contain any evidence of such crime: it was only in comparison with other records that a violation could be detected. The Special Agent admitted that he could not tell anything about the records as far as possible criminal conduct went just by examining them. Also, it is important to note that there was not an ongoing investigation of the Petitioner by the Internal Revenue Service at this time.

Even if the material be deemed to come within the plain view exception, this Court in *Coolidge* specifically rejected a warrantless seizure on this ground alone.

> "The limits on the doctrine are implicit in the statement of its rationale. The first of these is that plain view *alone* is never enough to justify the warrantless seizure of evidence. This is simply a corollary of the familiar principle discussed above,

> that no amount of probable cause can justify a warrantless search or seizure absent 'exigent circumstances.' Incontrovertible testimony of the senses that an incriminating object is on premises belonging to a criminal suspect may establish the fullest possible measure of probable cause. But even where the object is contraband, this Court has repeatedly stated and enforced the basic rule that the police may not enter and make a warrantless seizure." 403 U.S. at p. 468.

It is apparent that the lower court has not adequately analyzed the dichotomy between the search and seizure in this case. It is clear that the police would have needed a warrant in order to inspect the documents two days later in search of evidence of arson. Any search at that time of the records without the warrant would have been without justification absent exigent circumstances. If the city police could not search the records for evidence of a crime even though they had probable cause in absence of a warrant, then the "silver platter' doctrine cannot be utilized as was done by the Circuit Court, 476 F.2d at p. 1014, because at the point the documents were turned over to the federal agents it was no longer legally in the possession of the state agents.

In *United States* v. *Soriano,* 482 F.2d 469 (5th Cir. 1973), the dichotomy between search and seizure was fully examined. In that case, exigent circumstances justified the seizure of a suitcase from a taxicab in which the defendant was riding. The defendant was arrested on a narcotics charge, and the suitcase was searched shortly thereafter. The court upheld the suppression of the narcotics in the suitcase on grounds that there were no exigent circumstances to justify the later warrantless

search even though the initial seizure was justified. Probable cause without exigent circumstances required a warrant for a search subsequent to the seizure.

As has been shown, the state agents here could not have examined the documents for evidence of arson two days after they had been seized as there were no exigent circumstances—even though they had probable cause. Such a situation is directly similar to that presented in *Coolidge* v. *New Hampshire, supra* when the state attempted to justify the search of the defendant's car two days after it was seized. This Court held that even though the officers had probable cause to search the car, there were no exigent circumstances justifying their proceeding without a warrant. The Court distinguished *Chambers* v. *Maroney,* 399 U.S. 42 (1970) on the grounds that there were no exigent circumstances at that time of the seizure that would have justified a warrantless search, so such a search could not be undertaken later.

In the case at bar, it is conceded for the sake of argument that there were exigent circumstances at the time of the seizure of the documents which would also have justified a contemporaneous warrantless search of them. However, such does not mean that a search two days later could be justified under the *Chambers* rationale that if it could legally have been done at the time of seizure it may also be done at a later point in time while in police custody. The *Chambers* rationale is valid only as long as the probable cause existing to justify the *initial* search is still present. Yet in the case at bar a confession was made the same day of the fire, thus precluding any further investigation of the documents by Captain Foushee. His testimony was that he never

bothered to examine the documents only because of this arrest (Appendix 107a). Thus, the day after the arrest, the police had no "probable cause" to suspect the documents contained any evidence of the crime of arson because the crime itself had been solved.

It is clear that the rationale for the retaining of the documents without a warrant expired, even under the *Chambers* case, when the third party confessed to the crime of arson. Thus, there was absolutely no legal basis for the retention of the documents by the police two days after the arson case was solved. At that point the documents were legally the Petitioner's no matter where they may have been. The Fourth Amendment protects people, not places. *Katz* v. *United States,* 389 U.S. 347 (1967). There was certainly no probable cause available to suspect a violation of the federal revenue laws and there were certainly no exigent circumstances preventing the procurement of a warrant even apart from probable cause.

As there were no reasons for not obtaining a search warrant, the subsequent seizure of those records was illegal and should have been suppressed at the trial. The taint of these illegally seized records clearly precluded any prosecution of the Petitioner. *Wong Sun, supra.*

III. The records were testimonial in nature and were thus barred from production at the trial.

Regardless of the legality of the initial seizure or the subsequent search of the records, their testimonial nature precluded their use in Petitioner's trial against his claim of self-incrimination under the Fifth Amendment. The Respondent has never denied that such

records would not be subject to a subpoena. The Circuit Court relied exclusively on its prior decision in *United States* v. *Blank,* 459 F.2d 383 (6th Cir. 1972) in upholding the production of these records despite the Fifth Amendment claim. In relying on that opinion, the court necessarily held that such records were not subject to a Fifth Amendment privilege because there was no "compulsion" in their production and such records were not of a "testimonial" nature. An examination of these two grounds will reveal their inadequacy.

As to the first argument, this Court declared in *Boyd* v. *United States,* 116 U.S. 616 (1885) the close connection between the Fourth and Fifth Amendments in considering the element of compulsion.

> "We have already noticed the intimate relation between the two Amendments. They throw great light on each other. For the 'unreasonable searches and seizures' condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a man 'in a criminal case to be a witness against himself,' which is condemned in the Fifth Amendment, throws light on the question as to what is an 'unreasonable search and seizure' within the meaning of the Fourth Amendment. And we have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself. We think it is within the clear intent and meaning of those terms."

As a matter of common sense, the idea that a citizen is under no "compulsion" when subjected to a search warrant is a hollow analysis. Whether under subpoena

or warrant, the government has equal ability to compel the citizen to surrender his possessions. As was stated in *Vonderahe* v. *Hawland,* 73-1 U.S.T.C. 9333 (9th Cir. 1973), a case that was severely critical of the *Blank* analysis:

> "We cannot accept the substantive merit of this approach. One need ask only what would happen if the addressee of a warrant refused to allow the search to be conducted to appreciate the magnitude of compulsion produced by a search warrant. Without the slightest hesitation his doors would be broken down, he would be placed under arrest. How the imminence of such force can be considered as anything other than compulsion escapes us."

This same line of reasoning was followed also in *Hill* v. *Philpott,* 445 F.2d 144 (7th Cir. 1971), a case followed by the *Vonderahe* court.

With regard to the second argument, the *Boyd* case once again provides the background to the issue. This Court amplified this decision further in *Gouled* v. *United States,* 255 U.S. 298 (1921), which held that seizure of "mere evidence" of a crime was subject to the Fifth Amendment. However, in *Warden* v. *Hayden,* 387 U.S. 294 (1967), this distinction was seemingly done away with. The *Warden* case held that items of clothing seized by police were neither "testimonial" nor "communicative" in nature and thus were not incriminatory to the defendant. The Court did not provide a blanket approval to such searches and seizures; rather, it explicitly allowed that some items could be precluded by their very nature.

> "This case does not require that we consider whether there are items of evidential value whose

very nature precludes them from being the object of a reasonable search and seizure." 387 U.S. at p. 303.

The case of *Schmerber* v. *California,* 384 U.S. 757 (1966) was cited by the *Warden* Court as providing guidance in considering the Fifth Amendment protection to seized items. In *Schmerber,* it was held that the first step in any such inquiry into the legitimacy of a seizure under the Fourth Amendment was the applicability of the Fifth Amendment. The Court decided that drawing of a blood sample was not a testimonial or communicative act under the Fifth Amendment. It then held that, although such acts were clearly under compulsion in Fourth Amendment terms, the exigencies of the situation justified the intrusion into the defendant's body. (This latter point is especially important in recalling the initial premise of *Blank* that the element of compulsion is absent in a Fourth Amendment situation.)

Taking all these cases together, it would appear that this Court has overruled *Gouled* only on the Fourth Amendment aspects of searches and seizures. But even the *Warden* decision left the Fourth Amendment protection intact; the decision held that the guiding principle was the individual's right to privacy. This Court has yet to rule that a Fifth Amendment claim is *per se* inapplicable when a proper search and seizure occur under the Fourth Amendment. This is the precise holdings of the *Hill* and *Vonderahe* cases while the *Blank* case applies a *per se* rule.

Later decisions of this Court have certainly implied that the privacy due citizens under the Fourth Amendment also extends to the Fifth Amendment. In *Couch* v. *United States,* 409 U.S. 322 (1973), the Court held that:

> "We hold today that no Fourth or Fifth Amendment claim can prevail where, as in this case, there exists no legitimate expectation of privacy and no semblance of governmental compulsion against the person of the accused." 409 U.S. at p. 336

Earlier the Court stated in a footnote that the Petitioner has contested the tax summons on the Fourth Amendment, but that the argument was "not independent of her Fifth Amendment argument." 409 U.S. at p. 325 n. 6.

In this case the Petitioner certainly had a right to expect that his records would not be subject to a subsequent seizure by federal agents. His right to privacy was certainly violated when the arson crime was solved and yet the police kept the records.

Thus, the issue becomes whether or not the documents involved here were of a "testimonial" or "communicative" nature and thus, precluded from production despite being seized, arguendo, validly under the Fourth Amendment. That question must surely be answered in the affirmative. The Circuit Court has apparently adopted the *Blank* rationale and held these records were not of a testimonial nature.

The *Blank* court found that gambling records were "business records" and thus not within any scope of private communications warranting the Fifth Amendment privilege. It is important to note the exact language used by the court in making this characterization, at page 385 of 459 F.2d:

> "1) The subjects of the seizure are not personal communications at all but rather business accounts *rendered extraordinary only by the fact that the business is itself illegal.*" (emphasis added)

In making this analysis, the court completely overlooked this Court's opinions in *Marchetti* v. *United States,* 390 U.S. 39 (1968) and *Grosso* v. *United States,* 390 U.S. 62 (1968). For in those cases, it was precisely the "illegality" of the activity involved that prevented the Government from obtaining production of such records.

The reasoning involved in these two cases makes it clear that the Petitioner was correct in moving to suppress the production of these records at his trial under the Fifth Amendment. For in these two Supreme Court cases, it was established that gambling records were not considered to be mere "business records". Such records were personal and obviously testimonial in nature. The only real issue in those cases was whether the claim of privilege was nonetheless precluded by some other doctrine—the "required records" theory. The Court ruled that such theory did not apply except when the purpose of an inquiry was "essentially regulatory" in nature and applied to records pertaining to non-criminal activities.

The most obvious error in considering these records "business records" is that there was no business involved. The artificial creation granted privileges by the state simply does not exist in this case nor did it exist in either of the two above cases. There is no "corporation" whose records need protection; thus, as was recognized by this Court in *Marchetti* and *Grosso,* the issue is whether or not these personal records are subject to production.

The records involved here could not have been produced either by subpoena or search warrant because the sole motive for such inquiry would have been furtherance of criminal charges. Clearly under both the above cases such an inquiry is precluded by the Fifth

Amendment for such records are of the precise nature of those that were involved in the *Grosso* case.

In summary, Petitioner contends that such records were not properly producible in court due to their clearly testimonial nature. This fatal defect is not cured by attributing the production to a search and seizure rather than a subpoena. In either instance the Petitioner was compelled to surrender evidence of an incriminating nature at his own criminal trial.

CONCLUSION

The records discovered by the police in their search for evidence of arson were not within the "plain view" exception to the Fourth Amendment's requirement for a search warrant. The records were the object of a planned search and were not "inadvertently" found. Additionally, the records were not immediately incriminating either to the officers when they discovered them or when the Internal Revenue Agents seized them two days later.

The inspection of the records by the Internal Revenue Service two days after the fire was invalid under the Fourth Amendment. There existed neither probable cause nor exigent circumstances to justify such a warrantless search and seizure. The city police were not legally in possession of those records at the time the Revenue Agents seized them, thus the federal agents cannot rely on the initial legality of the seizure even assuming arguendo that that seizure was legal.

The records were clearly testimonial in nature and were not producible at trial without a waiver by the Petitioner of his privilege against self-incrimination. The fact that the records may have been seized legally

under the Fourth Amendment (which Petitioner does not accept) does not vitiate the application of Petitioner's Fifth Amendment rights.

Respectfully submitted,

FRANK E. HADDAD, JR.
Counsel for Petitioner

FEB 14 19

Supreme Court Of The United States

JR.

October Term, 1974

No. 74-1019

ANTHONY JOSEPH GARGOTTO - **Petitioner**

vs.

UNITED STATES OF AMERICA - **Respondent**

APPENDIX TO BRIEF FOR PETITIONER

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Docket Entries

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF KENTUCKY
At Louisville

UNITED STATES OF AMERICA

vs. Indictment No. 27836
(26 USC Section 7201)

ANTHONY JOSEPH GARGOTTA

RELEVANT DOCKET ENTRIES

1972

5-18 Indictment returned and filed. Summons issued returnable May 19, 1972, at 9:30 a.m. Summons delivered to marshal for service.

5-22 Bond executed by Anthony Joseph Gargotto as principal and Martin Anthony Gargotto as surety, in the amount of $5,000.00 (10% cash deposit) returnable 10-3-72 at 9:30 a.m. filed.

5-22 Affidavit of cash surety filed, executed by principal and surety.

5-22-72 Order signed by Judge Gordon May 19, 1972, entering defendant's plea of NOT GUILTY to the fifteen counts of the Indictment. Case is passed until Oct. 3, 1972, at 9:30 a.m. for assignment of trial date. Deft.'s bond is set in the sum of $5,000.00 with 10% cash deposit acceptable, and is recognized by the Court for two days pending the posting of said bond. Copy to U.S. Atty.

5-22 Marshal's return filed executed as to Anthony Joseph Gargotta on 5-18-72.

5-30 Agreed Motion moving the Court to correct a clerical error in the name of the defendant—name

should be corrected from Gargotta to Gargotto filed; Order tendered.

5-30-72 Order signed by Judge Gordon that the spelling of the name of GARGOTTA be corrected to GARGOTTO. Copies to U. S. Atty and Frank Haddad, Jr.

6-1-72 Order signed by Mr. Winkenhofer for Judge Gordon on 6-1-72 setting case for TRIAL BEFORE A JURY on Monday, July 10, 1972. Tuesday, July 11 has been set aside by the Court if more than one day is needed.

6-23-72 Subpoena to Testify—Marshal's return filed executed as to Robert Brooks, F. S. Coots, Joseph R. Sandefur, Joseph S. Elder—Special Agents, IRS on June 22, 1972.

6-23-72 Subpoena to Produce Document or Object filed executed as to Edwin A. Schroering on June 22, 1972.

6-23-72 Petition for Writ of Habeas Corpus Ad Testificandum for Joyce Gail Arterburn filed by plaintiff.

6-23-72 Writ of Hazeas Corpus Ad Testificandum as to Joyce Gail Arterburn signed by Judge Allen on 6-23-72; copies to U. S. Marshal.

6-28 Subpoena to Testify filed executed as to Lawrence Gatti, Sr. on 6-26-72; and Subpoena to Testify executed as to Dr. Roland Combs on 6-27-72; and Subpoena to Testify executed as to Ben R. Edelen, Sr. on 6-28-72.

6-29 Motion to Suppress and to return evidence seized filed by Attorney for Defendant. Order tendered.

6-30 Subpoena to Testify return filed executed as to John Aubrey on 6-25-72 and Captain William Foshee on 6-30-72.

7-7-72 Partial Transcript of hearing in chambers filed by Ct. Reptr. Lee Sterling.

Docket Entries

6-30-72 Response to motion to suppress and to return evidence seized filed by U.S. Order tendered.

7-5-72 Marshal's return filed executed as to Joseph F. Weissenberger on 6-30-72.

7-3-72 Response to motion to suppress and to return evidence seized filed by U.S. Atty. (This is in addition to response filed on 6-30-72)

7-18 Subpoena to Produce Document of Object executed as to Courier Journal by serving Elmer Hall on 7-10-72.

7-18 Subpoena to Produce Document of Object executed as to Lynn Stone, President of Churchill Downs by serving Bob Graham on 7-10-72.

7-18 Subpoena to Testify filed executed as to Willian A. Foushee on 6-30-72; as to Robert Swanner and Dennis M. Davis on 7-5-72; and as to Warren Paine on 7-6-72.

7-18 Writ of Habaes Corpus Ad Testificandum—Marshal's return filed executed by delivering body of Jouce Gail Arterburn to Pewee Valley on 7-11-72.

7-12 JURY VERDICT: "We the Jury, find the defendant Anthony Joseph Gargotto
GUILTY as to Count 1 of the indictment
GUILTY as to Count 2 of the indictment
GUILTY as to Count 3 of the indictment
GUILTY as to Count 4 of the indictment
GUILTY as to Count 5 of the indictment
GUILTY as to Count 6 of the indictment
GUILTY as to Count 7 of the indictment
GUILTY as to Count 8 of the indictment
GUILTY as to Count 9 of the indictment
GUILTY as to Count 10 of the indictment
GUILTY as to Count 11 of the indictment
GUILTY as to Count 12 of the indictment

GUILTY as to Count 13 of the indictment
GUILTY as to Count 14 of the indictment
GUILTY as to Count 15 of the indictment

July 12, 1972 /s/ James J. McClelland, Foreman"

7-19	Notice of Appeal filed by Mr. Haddad. Copy to U.S. Atty., Mr. Haddad, and U.S. Marshal.
7-20	Judgment and Commitment by Judge Gordon 7-12-72: FIVE YEARS on ea. of 15 cts. contained in indictment for total sent of FIVE YEARS TO BE SERVED.
7-20	TRIAL ORDER by Judge Gordon reflecting Jury Verdict listed above. Copies to counsel. Further, dft's present bond converted to bond pending Appeal.
7-27	Criminal Appeals Form with copy of Notice of Appeal and Docket Entries mailed to U. S. Court of Appeals.
8-8-72	Transcript of Proceedings (Volumes 1, 2, & 3) filed, with exhibits 1 thru 10 Exhibit to first motion of July 11, 1972.Exhibit marked "Instructions" dated July 12, 1972, filed.
7-7	Reply to the U. S. Response to Defendant's motion to Suppress and to Return Evidence Seized.
7-10	ORDER by Judge Gordon dated 7-7-72 OVERRULING Defendant's Motion to Suppress, etc.
8-28	Record forwarded to U. S. Court of Appeals.
8-30	Receipt filed by Clerk, U. S. Court of Appeals showing filed 8-29-72.
5-25-73	Record received from Court of Appeals. Mandate issued remanding the case for further proceedings. Copy to counsel.
5-25-73	Opinion filed.
8-1	Motion filed by plff. that segregation be made in advance of hearing by the case agent, Mr. Joseph

Elder filed; Order tendered.

8-1 Response to Motion to segregate filed.

8-7-73 ORDER signed by Judge Gordon that the motion of the United States to segregate at this time is OVERRULED. Copies to: U. S. Attorney and Frank E. Haddad, Jr.

8-15 Order by Judge Allen on 8-13-73 that this action is continued to October 16, 1973 at 9:30 A.M. for the purpose of a hearing before the Honorable James F. Gordon.

10-12-73 Order by Judge Gordon that this case is continued from October 16, 1973 to October 25, 1973 at 2:00 P.M. for the purpose of a hearing before Judge Gordon.

11-30 Order by Judge Gordon that this case came on for hearing in chambers on Oct 25, 1973 pursuant to the order of the U. S. Court of Appeals, it is ordered that the exigencies of the situation justified Captain Foushee's decision to seize the records in the desk drawers and filing cabinets without first seeking a search warrant. Findings pursuant to the remand will be entered by the Court.

11-30 FINDINGS PURSUANT TO REMAND by Judge Gordon.

12-5 Notice of Appeal filed.

12-29 Transcript of Proceedings in chambers of Oct. 25, 1973 with exhibits 1 through 13, filed.

11/19/74 Opinion filed.

11/27/74 Petition for Rehearing filed.

1/15/75 Rehearing denied.

INDICTMENT NO. 27836
(26 USC SECTION 7201)

COUNT I

The Grand Jury charges:

That on or about the 28th day of October, 1968, in the Western District of Kentucky, ANTHONY JOSEPH

GARGOTTA, a resident of Louisville in the Western District of Kentucky who was engaged in the business of accepting wagers in the Western District of Kentucky, did willfully and knowingly attempt to evade and defeat a large part of the federal excise tax on wagers imposed by Section 4401 (a) of Title 26 of the United States Code, due and owing to the United States of America for the month of September, 1968, by filing and causing to be filed with the District Director of Internal Revenue at Louisville in the Western District of Kentucky, a false and fraudulent wagering excise tax return, wherein it was stated that the wagering excise tax due and owing the United States of America by reason of wagers accepted during the month of September, 1968, was the sum of two hundred and seven dollars and ninety cents ($207.90), whereas, as he then and there well knew, there were due and owing to the United States of America for that month wagering excise taxes in the sum of three hundred and twelve dollars and ninety cents ($312.90).

In violation of Section 7201 of the Internal Revenue Code of 1954, 26 United States Code, Section 7201.

COUNT TWO

The Grand Jury further charges:

That on or about the third day of December, 1968, in the Western District of Kentucky, ANTHONY JOSEPH GARGOTTA, a resident of Louisville in the Western District of Kentucky who was engaged in the business of accepting wagers in the Western District of Kentucky, did willfully and knowingly attempt to evade and defeat a large part of the federal excise tax on wagers imposed by Section 4401(a) of Title 26 of the United States Code, due and owing to the United States of America for the month of October, 1968, by filing and causing to be filed with the District Director of Internal Revenue at Louisville in the Western District of Kentucky, a false and fraudulent wagering excise tax return, wherein it

was stated that the wagering excise tax due and owing the United States of America by reason of wagers accepted during the month of October, 1968, was the sum of two hundred and sixty-four dollars and eighty cents ($264.80), whereas, as he then and there well knew, there were due and owing to the United States of America for that month wagering excise taxes in the sum of five hundred and eighty-five dollars and eighty cents ($585.80).

In violation of Section 7201 of the Internal Revenue Code of 1954, 26 United States Code, Section 7201.

COUNT THREE

The Grand Jury further charges:

That on or about the third day of January, 1969, in the Western District of Kentucky, ANTHONY JOSEPH GARGOTTA, a resident of Louisville in the Western District of Kentucky who was engaged in the business of accepting wagers in the Western District of Kentucky, did willfully and knowingly attempt to evade and defeat a large part of the federal excise tax on wagers imposed by Section 4401(a) of Title 26 of the United States Code, due and owing to the United States of America for the month of November, 1968, by filing and causing to be filed with the District Director of Internal Revenue at Louisville in the Western District of Kentucky, a false and fraudulent wagering excise tax return, wherein it was stated that the wagering excise tax due and owing the United States of America by reason of wagers accepted during the month of November, 1968, was the sum of two hundred and seventy-eight dollars and eighty cents ($278.80), whereas, as he then and there well knew, there were due and owing to the United States of America for that month wagering excise taxes in the sum of five hundred and fifty-nine dollars and seventy cents ($559.70).

In violation of Section 7201 of the Internal Revenue Code of 1954, 26 United States Code, Section 7201.

Indictment

COUNT FOUR

The Grand Jury further charges:

That on or about the 30th day of January, 1969, in the Western District of Kentucky, ANTHONY JOSEPH GARGOTTA, a resident of Louisville in the Western District of Kentucky who was engaged in the business of accepting wagers in the Western District of Kentucky, did willfully and knowingly attempt to evade and defeat a large part of the federal excise tax on wagers imposed by Section 4401(a) of Title 26 of the United States Code, due and owing to the United States of America for the month of December, 1968, by filing and causing to be filed with the District Director of Internal Revenue at Louisville in the Western District of Kentucky, a false and fraudulent wagering excise tax return, wherein it was stated that the wagering excise tax due and owing the United States of America by reason of wagers accepted during the month of December, 1968, was the sum of two hundred and twenty-eight dollars ($228.00), whereas, as he then and there well knew, there were due and owing to the United States of America for that month wagering excise taxes in the sum of three hundred and ninety-nine dollars and fifty cents ($399.50).

In violation of Section 7201 of the Internal Revenue Code of 1954, 26 United States Code, Section 7201.

COUNT FIVE

The Grand Jury further charges:

That on or about the 18th day of March, 1969, in the Western District of Kentucky, ANTHONY JOSEPH GARGOTTA, a resident of Louisville in the Western District of Kentucky who was engaged in the business of accepting wagers in the Western District of Kentucky, did willfully and knowingly attempt to evade and defeat a large part of the federal excise tax on wagers imposed by Section 4401(a) of Title 26 of the United States Code, due and owing to the United

States of America for the month of January, 1969, by filing and causing to be filed with the District Director of Internal Revenue at Louisville in the Western District of Kentucky, a false and fraudulent wagering excise tax return, wherein it was stated that the wagering excise tax due and owing the United States of America by reason of wagers accepted during the month of January, 1969, was the sum of two hundred and sixty-seven dollars ($267.00), whereas, as he then and there well knew, there were due and owing to the United States of America for that month wagering excise taxes in the sum of four hundred and twenty-seven dollars and seventy cents ($427.70).

In violation of Section 7201 of the Internal Revenue Code of 1954, 26 United States Code, Section 7201.

COUNT SIX

The Grand Jury further charges:

That during the month of February, 1969, ANTHONY JOSEPH GARGOTTA, a resident of Louisville in the Western District of Kentucky who was engaged in the business of accepting wagers, did accept wagers at Louisville in the Western District of Kentucky in the approximate amount of five thousand six hundred and thirty-two dollars and fifty cents ($5,632.50) on which a wagering excise tax was due and owing to the United States of America in the amount of five hundred and sixty-three dollars and twenty-five cents ($563.25) and by reason of which he was required by Section 4401 of Title 26 of the United States Code to file a wagering excise tax return with the District Director of Internal Revenue at Louisville in the Western District of Kentucky on or before the last day of March, 1969, stating the amount of wagering excise tax due to the United States of America for the month of February, 1969; and that well knowing the foregoing facts, ANTHONY JOSEPH GARGOTTA did willfully and knowingly attempt to evade and defeat the

wagering excise tax due and owing by him to the United States of America for the month of February, 1969, by failing to make such wagering excise tax return to the District Director of Internal Revenue at Louisville in the Western District of Kentucky or to any other proper officer of the United States of America, by failing to pay the wagering excise tax due and owing from him to the United States of America, and by concealing and attempting to conceal from all proper officers of the United States of America his true and correct wagering excise tax liability.

In violation of Section 7201 of the Internal Revenue Code of 1954, 26 United States Code, Section 7201.

COUNT SEVEN

The Grand Jury further charges:

That on or about the 27th day of May, 1969, in the Western District of Kentucky, ANTHONY JOSEPH GARGOTTA, a resident of Louisville in the Western District of Kentucky who was engaged in the business of accepting wagers in the Western District of Kentucky, did willfully and knowingly attempt to evade and defeat a large part of the federal excise tax on wagers imposed by Section 4401(a) of Title 26 of the United States Code, due and owing to the United States of America for the month of March, 1969, by filing and causing to be filed with the District Director of Internal Revenue at Louisville in the Western District of Kentucky, a false and fraudulent wagering excise tax return, wherein it was stated that the wagering excise tax due and owing the United States of America by reason of wagers accepted during the month of March, 1969, was the sum of one hundred and fourteen dollars ($114.00), whereas, as he then and there well knew, there were due and owing to the United States of America for that month wagering excise taxes in the sum of three thousand, eight hundred and twenty-nine dollars and sixty cents ($3,829.60).

In violation of Section 7201 of the Internal Revenue Code of 1954, 26 United States Code, Section 7201.

COUNT EIGHT

The Grand Jury further charges:

That on or about the 30th day of June, 1969, in the Western District of Kentucky, ANTHONY JOSEPH GARGOTTA, a resident of Louisville in the Western District of Kentucky who was engaged in the business of accepting wagers in the Western District of Kentucky, did willfully and knowingly attempt to evade and defeat a large part of the federal excise tax on wagers imposed by Section 4401(a) of Title 26 of the United States Code, due and owing to the United States of America for the month of April, 1969, by filing and causing to be filed with the District Director of Internal Revenue at Louisville in the Western District of Kentucky, a false and fraudulent wagering excise tax return, wherein it was stated that the wagering excise tax due and owing the United States of America by reason of wagers accepted during the month of April, 1969, was the sum of one hundred and sixty-eight dollars ($168.00), whereas, as he then and there well knew, there were due and owing to the United States of America for that month wagering excise taxes in the sum of one hundred and eighty-nine dollars and ninety cents ($189.90).

In violation of Section 7201 of the Internal Revenue Code of 1954, 26 United States Code, Section 7201.

COUNT NINE

The Grand Jury further charges:

That on or about the sixth day of August, 1969, in the Western District of Kentucky, ANTHONY JOSEPH GARGOTTA, a resident of Louisville in the Western District of Kentucky who was engaged in the business of accepting wagers in the Western District of Kentucky, did willfully and knowingly attempt to evade and defeat a large part of the

federal excise tax on wagers imposed by Section 4401(a) of Title 26 of the United States Code, due and owing to the United States of America for the month of May, 1969, by filing and causing to be filed with the District Director of Internal Revenue at Louisville in the Western District of Kentucky, a false and fraudulent wagering excise tax return, wherein it was stated that the wagering excise tax due and owing the United States of America by reason of wagers accepted during the month of May, 1969, was the sum of one hundred and fifty-eight dollars ($158.00), whereas, as he then and there well knew, there were due and owing to the United States of America for that month wagering excise taxes in the sum of three hundred and three dollars ($303.00).

In violation of Section 7201 of the Internal Revenue Code of 1954, 26 United States Code, Section 7201.

COUNT TEN

The Grand Jury further charges:

That on or about the 20th day of August, 1969, in the Western District of Kentucky, ANTHONY JOSEPH GARGOTTA, a resident of Louisville in the Western District of Kentucky who was engaged in the business of accepting wagers in the Western District of Kentucky, did willfully and knowingly attempt to evade and defeat a large part of the federal excise tax on wagers imposed by Section 4401(a) of Title 26 of the United States Code, due and owing to the United States of America for the month of June, 1969, by filing and causing to be filed with the District Director of Internal Revenue at Louisville in the Western District of Kentucky, a false and fraudulent wagering excise tax return, wherein it was stated that the wagering excise tax due and owing the United States of America by reason of wagers accepted during the month of June, 1969, was the sum of one hundred and eighty-nine dollars ($189.00), whereas, as he then and there well knew, there were due and owing to the United States of America for that month wagering excise taxes in the sum of

two hundred and twenty-six dollars and ninety cents ($226.90).

In violation of Section 7201 of the Internal Revenue Code of 1954, 26 United States Code, Section 7201.

COUNT ELEVEN

The Grand Jury further charges:

That during the month of July, 1969, ANTHONY JOSEPH GARGOTTA, a resident of Louisville in the Western District of Kentucky who was engaged in the business of accepting wagers, did accept wagers at Louisville in the Western District of Kentucky in the approximate amount of two thousand and twenty-five ($2,025.00) on which a wagering excise tax was due and owing to the United States of America in the amount of two hundred and two dollars and fifty cents ($202.50) and by reason of which he was required by Section 4401 of Title 26 of the United States Code to file a wagering excise tax return with the District Director of Internal Revenue at Louisville in the Western District of Kentucky on or before the last day of August, 1969, stating the amount of wagering excise tax due to the United States of America for the month of July, 1969; and that well knowing the foregoing facts, ANTHONY JOSEPH GARGOTTA did willfully and knowingly attempt to evade and defeat the wagering excise tax due and owing by him to the United States of America for the month of July, 1969, by failing to make such wagering excise tax return to the District Director of Internal Revenue at Louisville in the Western District of Kentucky or to any other proper officer of the United States of America, by failing to pay the wagering excise tax due and owing from him to the United States of America, and by concealing and attempting to conceal from all proper officers of the United States of America his true and correct wagering excise tax liability.

In violation of Section 7201 of the Internal Revenue Code of 1954, 26 United States Code, Section 7201.

Indictment

COUNT TWELVE

The Grand Jury further charges:

That on or about the 25th day of November, 1969, in the Western District of Kentucky, ANTHONY JOSEPH GARGOTTA, a resident of Louisville in the Western District of Kentucky who was engaged in the business of accepting wagers in the Western District of Kentucky, did willfully and knowingly attempt to evade and defeat a large part of the federal excise tax on wagers imposed by Section 4401(a) of Title 26 of the United States Code, due and owing to the United States of America for the month of September, 1969, by filing and causing to be filed with the District Director of Internal Revenue at Louisville in the Western District of Kentucky, a false and fraudulent wagering excise tax return, wherein it was stated that the wagering excise tax due and owing the United States of America by reason of wagers accepted during the month of September, 1969, was the sum of two hundred and twenty dollars ($220.00), whereas, as he then and there well knew, there were due and owing to the United States of America for that month wagering excise taxes in the sum of two hundred and thirty-nine dollars and seventy cents ($239.70).

In violation of Section 7201 of the Internal Revenue Code of 1954, 26 United States Code, Section 7201.

COUNT THIRTEEN

The Grand Jury further charges:

That on or about the 19th day of January, 1970, in the Western District of Kentucky, ANTHONY JOSEPH GARGOTTA, a resident of Louisville in the Western District of Kentucky who was engaged in the business of accepting wagers in the Western District of Kentucky, did willfully and knowingly attempt to evade and defeat a large part of the federal excise tax on wagers imposed by Section 4401(a) of Title 26 of the United States Code, due and owing to the United

States of America for the month of October, 1969, by filing and causing to be filed with the District Director of Internal Revenue at Louisville in the Western District of Kentucky, a false and fraudulent wagering excise tax return, wherein it was stated that the wagering excise tax due and owing the United States of America by reason of wagers accepted during the month of October, 1969, was the sum of two hundred and twenty-eight dollars ($228.00), whereas, as he then and there well knew, there were due and owing to the United States of America for that month wagering excise taxes in the sum of two hundred and ninety-five dollars ($295.00).

In violation of Section 7201 of the Internal Revenue Code of 1954, 26 United States Code, Section 7201.

COUNT FOURTEEN

The Grand Jury further charges:

That on or about the 19th day of January, 1970, in the Western District of Kentucky, ANTHONY JOSEPH GARGOTTA, a resident of Louisville in the Western District of Kentucky who was engaged in the business of accepting wagers in the Western District of Kentucky, did willfully and knowingly attempt to evade and defeat a large part of the federal excise tax on wagers imposed by Section 4401(a) of Title 26 of the United States Code, due and owing to the United States of America for the month of November, 1969, by filing and causing to be filed with the District Director of Internal Revenue at Louisville in the Western District of Kentucky, a false and fraudulent wagering excise tax return, wherein it was stated that the wagering excise tax due and owing the United States of America by reason of wagers accepted during the month of November, 1969, was the sum of two hundred and two dollars and twenty cents ($202.20), whereas, as he then and there well knew, there were due and owing to the United States of America for that month wagering excise taxes in the sum of two hundred and eighty-seven dollars and

thirty cents ($287.30).

In violation of Section 7201 of the Internal Revenue Code of 1954, 26 United States Code, Section 7201.

COUNT FIFTEEN

The Grand Jury further charges:

That on or about the 19th day of January, 1970, in the Western District of Kentucky, ANTHONY JOSEPH GARGOTTA, a resident of Louisville in the Western District of Kentucky who was engaged in the business of accepting wagers in the Western District of Kentucky, did willfully and knowingly attempt to evade and defeat a large part of the federal excise tax on wagers imposed by Section 4401(a) of Title 26 of the United States Code, due and owing to the United States of America for the month of December, 1969, by filing and causing to be filed with the District Director of Internal Revenue at Louisville in the Western District of Kentucky, a false and fraudulent wagering excise tax return, wherein it was stated that the wagering excise tax due and owing the United States of America by reason of wagers accepted during the month of December, 1969, was the sum of one hundred and ninety dollars ($190.00), whereas, as he then and there well knew, there were due and owing to the United States of America for that month wagering excise taxes in the sum of two hundred and forty-four dollars and thirty cents ($244.30).

In violation of Section 7201 of the Internal Revenue Code of 1954, 26 United States Code, Section 7201.

A True Bill.

Jessee J. Franklin
Foreman

George J. Long
United States Attorney
Dated: May 18, 1972

MOTION TO SUPPRESS AND TO RETURN EVIDENCE SEIZED

(Filed June 29, 1972)

Comes the Defendant herein and moves the Court to suppress as evidence all matters seized from him or his premises located at 238 West Jefferson Street, Louisville, Kentucky, and further suppress any evidence, oral or written, derived therefrom for the following reasons:

1. Said Evidence was seized without a search warrant.
2. Said evidence was not obtained as a result of any arrest of the Defendant.
3. Said evidence was seized without the consent of the Defendant.

The Defendant further States that in order to properly rule on this motion, that it will be necessary for, and the Defendant so moves, that this Court have an evidentiary hearing.

FRANK E. HADDAD, JR.
Attorney for Defendant
529 Kentucky Home Life Building
Louisville, Kentucky 40202

JUDGMENT AND COMMITMENT

(Entered July 20, 1972)

On this 12th day of July, 1972, came the attorney for the government and the defendant appeared in person and by counsel, Hon. Frank E. Haddad, Jr.

It Is Adjudged that the defendant has been convicted upon his plea of NOT GUILTY by a Jury of the offense of attempting to avoid wagering excise tax in violation of Title 26, U.S. Code, Section 7201 as charged in the 15 Count Indictment, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced,

and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted. Presentence report was furnished by the Probation Office and read by the Court.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of FIVE YEARS on each of the 15 counts contained in the Indictment, said sentences to be served concurrently, each with the other, for a TOTAL SENTENCE OF FIVE YEARS TO BE SERVED.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

JAMES F. GORDON,
United States District Judge

Entered July 20, 1972

TRIAL ORDER

(Entered July 20, 1972)

The above-styled case was called in open court on Monday, July 10, 1972, at 9:30 A.M., and there appeared Honorable George J. Long, United States Attorney and Honorable W. Waverley Townes, Assistant United States Attorney on behalf of the Government and the defendant, Anthony Joseph Gargotto, in person and with employed counsel, Honorable Frank E. Haddad, Jr.

The jury was impanelled and sworn as follows:

Mr. Kenneth R. Kennedy
Mrs. Wanda P. Koch
Mrs. Mittie S. Tramel
Mrs. Betty Lou Whitworth
Mrs. Freda V. Patterson
Mr. James P. McClelland, Jr.

Mrs. Evelyn E. Wines
Mr. William C. Korb
Mrs. Shirley A. Hail
Mrs. Florence Mather
Mrs. Della A. Dexheimer
Mrs. Bessie Valentine

Alternate Juror: Mrs. Houston V. Cole

The following oral motions were made by Mr. Haddad on behalf of the defendant:

1—Motion to Suppress certain papers and documents (renewal of motion previously made to Court and OVERRULED) Court OVERRULED the renewed motion.

2—Motion to Suppress introduction of Forms 730 filed by Mr. Gargotto with the Government. Court OVERRULED the motion.

Motion having been made by counsel for the defendant, the rule for separation of witnesses was invoked.

Mr. Long read the Indictment and made opening statements on behalf of the Government. Mr. Haddad reserved his right for an opening statement.

Mr. Haddad made oral objection to certain evidence being introduced by the Government. Court OVERRULED the objection.

The following evidence was presented by Mr. Long on behalf of the United States:

GW #1 Captain William Foushee
GW #2 Mr. John E. Aubry
GW #3 Special Agent Frank S. Coots
GW #4 Mr. Edwin Schroering, Jr.
GW #5 Mr. Ben Eadlin

In camera, Mr. Haddad, counsel for the defendant, moved the Court to suppress the evidence brought forward by the witness, Mr. Eadlin. Court OVERRULED the motion.

Trial Order

Upon returning to open court, Mr. Long proceeded with the Government's evidence as follows:

GW #6 Mr. Joseph Sanford
GW #7 Mr. Warren M. Payne
GW #8 Mr. Lawrence Gaddie
GW #9 Dr. Roland Combs

Court adjourned for the day at 4:00 p.m. with it to reconvene July 11, 1972.

Court reconvened Tuesday, July 11, 1972, at 9:30 a.m.

Mr. Haddad moved the Court to discharge the jury. Court OVERRULED the motion.

Mr. Long then proceeded to present evidence on behalf of the Government:

GW #10 Mr. Bob Goram
GW #11 Mr. Elmer Hall
GW #12 Mr. Dennis Davis
GW #13 Mr. Melvin Arterburn
GW #14 Mrs. Joyce Gail Arterburn

In camera, Court advised counsel that Mr. William Korb, a juror, was ill, and accordingly the alternate juror, Mr. Houston V. Cole, was substituted in his place.

Upon returning to open court, Mr. Long proceeded with the Government's evidence as follows:

GW #15 Mr. Joseph S. Elder

Oral motion was made by Mr. Haddad to the Court to disallow Mr. Elder to give expert summary testimony. Court OVERRULED the motion.

Various motions were made to the Court by Mr. Haddad, counsel for the defendant, at intervening times during the presentation of the Government's evidence, and are so reflected in the record.

The case was concluded for the Government.

In camera, Mr. Haddad made motions to the Court as follows:

1—Motion to Suppress various evidence - OVERRULED.

2—Motion to Dismiss Counts 6 and 11 of the Indictment - OVERRULED.

3—Motion for Judgment of Acquittal - OVERRULED.

4—Renewed motion to discharge jury - OVERRULED.

Court adjourned for the day at 3:40 p.m., with it to reconvene at 9:30 a.m., July 12, 1972.

Court reconvened Wednesday, July 12, 1972, with Mr. Haddad presenting closing arguments on behalf of the defendant and by Mr. Long on behalf of the Government.

Court instructed the jury, and it retired to deliberate and arrive upon a verdict.

At 12:25 P.M., the jury returned to open court and rendered the following verdict:

"We, the Jury, find the defendant Anthony Joseph Gargotto

GUILTY as to Count 1 of the indictment
GUILTY as to Count 2 of the indictment
GUILTY as to Count 3 of the indictment
GUILTY as to Count 4 of the indictment
GUILTY as to Count 5 of the indictment
GUILTY as to Count 6 of the indictment
GUILTY as to Count 7 of the indictment
GUILTY as to Count 8 of the indictment
GUILTY as to Count 9 of the indictment
GUILTY as to Count 10 of the indictment
GUILTY as to Count 11 of the indictment
GUILTY as to Count 12 of the indictment
GUILTY as to Count 13 of the indictment
GUILTY as to Count 14 of the indictment
GUILTY as to Count 15 of the indictment

July 12, 1972 James J. McClelland, Foreman"

Polling of the jury was waived by counsel.

The jury was then dismissed and sentence was imposed.

Following imposition of sentence, the defendant was advised of his right to appeal in forma pauperis if unable to pay

the costs. He was also advised that if he was financially unable to obtain counsel to represent him on appeal that counsel would be appointed for him.

On motion of the defendant, IT IS HEREBY ORDERED that defendant's present bond is converted to a bond pending appeal.

Court was adjourned.

Dated: 7-20-72

JAMES F. GORDON
United States District Judge

Entered July 20, 1972
Copies to counsel.

TRANSCRIPT OF PROCEEDINGS

(Filed July 12, 1972)

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CAPTAIN WILLIAM FOUSHEE, called as a witness, by the Plaintiff, having been first duly sworn, was examined and testified as follows, to-wit:

DIRECT EXAMINATION BY

MR. LONG:

Q Would you state your name, please sir, to the Court and Jury?

A William Foushee.

Q Will you speak up good and loud now, Mr. Foushee, or Captain Foushee, so that the jury and the reporter can hear you, please, and so I can hear you and this last lady over here (Indicating) can hear you also. By whom are you employed, sir?

A Louisville Division of Fire.

Q And where do you live?

A 9100 Wanlou Drive, Valley Station, Kentucky.

Q What is your job with the Louisville Division of Fire?

Testimony of William Foushee

A I am a captain in charge of the Arson Squad.

Q And what do your duties entail at that position?

A Investigate fires, explosions, determine

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what causes the fire or who caused it.

Q Now, for the Jury's information, are you a fireman or what is your particular job?

A I am an Arson Investigator to enforce all state and local ordinances pertaining to investigation of fires.

Q What do you do as an arson investigator in the performance of your duties?

A I attempt to determine what caused the fire. If it is an incindiary fire, a fire that has been set, we try to determine who set the fire. Naturally, we collect evidence in arson cases and then we bring that person before the court.

Q As an arson investigator, does it require any special schooling or education?

A Yes sir; it does.

Q Have you attended any schools to become an arson investigator?

A Yes sir.

Q Would you tell the Court and the Jury what schools you have attended?

A I have attended two arson seminars at Purdue University in Lafayette, Indiana, one, and one at Columbus, Ohio and Ohio State University.

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I have attended an arson seminar in Austin, Texas. We have had numerous demonstrations and experimented with fires at other schools within the state.

Q Have you written any articles or any publications on arson or fire investigation?

A I haven't written any, no.

Q Have you given any instruction to any other personnel with regard to this line?

Testimony of William Foushee

A Yes sir; for the past ten years I have served as an instructor at the Kentucky State Fire School in Lexington, Kentucky.

Also I have instructed in the Jefferson County and Police Recruit Schools, Kentucky State Police Recruit School and I have just returned from Paducah, Kentucky where I instructed law enforcement officials, arson investigators and firemen at the Paducah Community College, which is an extension of the University of Kentucky.

Q All right sir; would you tell the jury how an arson investigator gets to a fire, or at the scene of a fire during the fire or after a fire; just tell them how it happens—what happens.

A On an ordinary fire, if the officer in charge of that fire is suspicious of it being set he calls an arson investigator.

After he is called, the commanding officer at the fire, arson investigator, arrives at the scene and he normally tells why he is called and gives him whatever information he might have. After this the investigator must see for himself the origin of the fire, what is in that area of origin that may or may not have caused the fire.

If there is no natural cause, we—uh, we look for a natural cause, but if we find none, and by natural cause I would say like electric wiring, motors and the like, uh, if we find none natural we must continue our investigation to see just what happened.

We would remove any evidence that we find in the building, anything to indicate the fire was set or anything that would help prove it was set.

Q What do you mean, Captain Foushee, by "anything"? Give the jury an example of what you are looking for.

A Well, for instance if we find a hot plate at the point of origin, we would remove this hot plate as probable evidence that it may have been used to ignite the fire.

We also remove in some instances, we remove records,

papers, or anything else that we might feel that would be important to the case because when we arrive on the

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scene we only have the information furnished to us and then after that we must find it for ourselves.

We don't know whether we have got a fraud fire or what type of fire we have. So, therefore, it is absolutely necessary for us to lay a good ground work and this good ground work turns out real well in finding all of the evidence that we can at that time.

Q How many fires have you investigated, Captain Foushee, in Louisville?

A Well, we investigate over a hundred a month.

Q And how many months have you been working at this particular job?

A I have been employed as an arson investigator since October 28, 1958.

Q Did you have cause to investigate a fire at 238 West Jefferson Street back in March of 1969?

A Yes sir; I did.

Q Would you tell the jury what time you arrived there and what happened to that scene?

A I received a call on March 22, 1969 at approximately 8:20 and I would estimate 25 to 30 minutes later I arrived on the scene.

The fire had been extinguished, but the fire

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equipment was still present and, according to the information I received, there was direct evidence that the fire was set.

We have several other men that belong to our organization, but none of those men were there. Shortly after my arrival and after I received this information, Detective John Aubrey, whom I know very well, was standing at the scene and I asked if he would give me some assistance, which he did.

Testimony of William Foushee

We entered the building at 238 West Jefferson Street and found that there were numerous separate fires, meaning separate and unrelated—not fires that were communications, one fire being set with a flammable liquid.

You enter this second floor by a front stairway and upon reaching the top of the stairway, around an open stairway and on the platform above and around the side of it there were very sharp burn patterns, which indicated to me that an accelerant, or a flammable liquid had been used in that there were burned spots.

You could tell where it was poured and in a case where a flammable liquid is used, it would seep through the cracks in the floor and will burn underneath the floor and on top at the same time. That is the way a normal fire will burn.

In the next room back—it was a rather large

room, and it appeared that just merely trash had been set on fire and, according to our information, our investigation, a fireman walked between these two fires, which would help indicate to me that they were separate and non-communications.

On the third floor of this building there was some more trash and debris that had burned at the far northern section of the building and at the far southern section of the building.

Since we were unaware at this point as to who may have set the fire or what might be behind this setting of the fire I felt it necessary to remove any evidence that we could find, which included records.

Some records that were removed had to been scattered out on the floor, possibly by the hose stream, and Detective Aubrey assisted and we did not have time to study these records. We merely picked them up and, after picking up the records we drove direct to Police Headquarters.

Q Let me interrupt you right there now, and ask you to describe to the jury what type building this is; you said that

there was a first floor and a third floor. Now, what does the first floor consist of?

A A Gaslight Theater—it's called Gaslight Theater.

Q Well, what is that? Is that a movie

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theater?

A Yes, it is.

Q And there was fire on the first floor?

A No sir.

Q All right sir.

A Fire on the second and third.

Q All right; what was on the second floor?

A On the second floor there was tables, which indicated the possibility of, it looked like card tables.

MR. HADDAD: Object, if Your Honor please.

BY THE COURT: Sir?

MR. HADDAD: Objection.

BY THE COURT: Overruled.

Q Was there a fire on the second floor?

A Yes sir; there were—

Q (Interrupting) I mean, excuse me, had there been a fire on the second floor?

A Had there been a fire on the second floor? Yes sir.

Q Now, what was on the third floor of the building?

A The two separate fires that were there

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and also, we removed records from up there and, again, there was tables of the same type and so forth as we had noticed on the second floor.

Q Where did you remove the records from?

A The second and third floors.

Q What were these records? What were they—describe—just describe to the jury where they were and what they looked like and by that, I mean were they in filing cabinets or that nature?

Testimony of William Foushee

A A lot of them—a lot of them were scattered on the floor. Some of them were in cabinets and some of them were removed from the office which was in the far northern end of the second floor.

They were not locked up and, like I said, we removed some from the floor and a few from the cabinets. We did not have time to study these records at this time really, in what we did have.

Q I believe you told the jury a minute ago that the hose stream had scattered them. What do you mean by that?

A Well, in fighting a fire—

MR. HADDAD: (Interrupting) Will you speak a little louder, please?

A (Continuing) A lot of times while fighting

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a fire the hose stream hits a filing cabinet or anything and it scatters whatever is inside it.

Q And you picked up these records then; is that what you're saying?

A Yes sir.

Q What did you do then with the records?

A We put them in a fire coat—a fire coat and put them in Sergeant Aubrey's car, or in Detective Aubrey's car and we took them to Louisville Police Headquarters.

Q What did you do with them; just leave them at Police Headquarters?

A No sir; they were put in the Intelligence Office at Police Headquarters and locked.

Q And who were they turned over to there?

A I—Sergeant Aubrey was in charge of the Intelligence Section and he and I took them in his office and locked them up.

Q All right sir; who was present at 238 West Jefferson Street the day of the fire; was Mr. Gargotto there?

A Yes sir; he was. I talked to him at the scene of the fire.

Q What else happened; did anything happen

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later about these records?

A Yes sir; when firemen arrive—like I say, we had a number of things to do, but when fireman arrive they remove—oh, removed a civilian from inside the building. The building was locked up as far as we could tell.

He had been turned over to a Louisville Police Beat car who was holding him. I interviewed Allen Carter Hooper, and later on that day we did arrest Allen Carter Hooper and charged him.

MR. HADDAD: Who? I can't hear, Your Honor; can he speak up a little louder?

THE WITNESS: We arrested Allen Hooper and charged him with setting fire to the Gaslight Theater.

Q Had you ever—did you tell Mr. Gargotto you had taken the records from the Gaslight?

A I don't recall telling him that day, no.

Q Did you tell him any other time?

A Yes sir.

Q When was that?

A Mr. Gargotto called me on the phone and said he had been informed that I had taken some records from the Gaslight Theater. I informed him that I had but they had been turned over to the Commonwealth Attorney, Mr.

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Edwin Schroering.

Q Were any of these records that you took from the second or third floor burned or damaged by water?

A I would say probably some were wet. I don't recall whether any—any of them burned or not.

Q Was there any damage to them at all that you could see?

A Outside of being dirty, possibly dirty or wet.

Q Was there any smoke damage on them?

A I don't recall.

MR. LONG: All right sir; I believe that's all, Your Honor please.

CROSS EXAMINATION BY

MR. HADDAD:

Q As I understand from what you testified here, by the time you got there the fire had already been extinguished?

A That's right.

Q Is that correct?

A Yes sir.

Q All right. Now, Captain, I am going to ask you, please, make an effort to keep your voice up. It is very difficult to hear you and if you would speak loud

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enough so that I can hear you I know that the jury and the court can hear you so, please make an effort to do that for us. Before you went into the building you say you saw Sergeant John Aubrey there at the scene; is that correct?

A Yes sir; it is.

Q And you asked him to assist you in going into the building and making your inspection?

A Yes sir.

Q And that was the purpose of your going into the building, to make an inspection; is that correct?

A That's right.

Q And you had received a call to come to the scene and when you arrived at the scene you had received information that those who were there believed that the fire had been set; is that correct?

A Yes sir.

Q You are not called to every fire, are you?

A No sir.

Q Nor is there an investigator from the Arson Squad called to every fire?

A No sir.

Q So, in this instance there was a reason for someone to call you there as they suspected for one

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reason or another that there was some arson investigation that needed to be done?

A Yes sir.

Q You proceeded to go into the building for the first time with Sergeant Aubrey?

A That is correct.

Q Did you examine the first floor of these premises?

A Not at that time. Later on I did go into the second and first floors.

Q Your initial entry into the building was to the stairs leading to the second and third floors?

A That's right.

Q Anybody besides Aubrey with you at that time?

A Not that I recall.

Q Do you or can you give us an approximate estimate of how deep this building is—how long it is?

A I don't know exactly, but it's a rather large building, three stories in height.

Q As you arrive on the second floor of this building using the steps from the street, do you enter into a hallway?

A Yes sir.

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Q And the room or rooms on the second floor—oh, rather, let's ask you this question; how many rooms are there on that second floor; one large one outside of the hallway?

A There is one large one outside of the hallway and there was an office at the north end.

Q That would be at the front end of the building?

A That's right.

Q So, as you come onto the second floor, the rooms are separated by a wall. You go into one door and the very front of it and that's an office and then you go into another door and

you get into the second large room in the building; is that correct?

A That's right.

Q Now, when you approached the second floor of this building with Aubrey you saw something in the hallway, you said, that indicated that there were two or more fires set there?

A In this hallway, it gave an indication that flammable liquid had been used.

Q All right. Now, I take it that you examined that area?

A That is correct; yes sir.

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Q Which of the two rooms did you go into first, the office or the other room?

A I don't recall just which room I entered next.

Q All right. So, whenever it was that you did enter the office did you have Sergeant Aubrey with you at that time?

A Yes sir.

Q Anyone else?

A Not that I recall.

Q All right; what did you remove from the office?

A There were some records. We did not, uh, Mr. Haddad, we did not take time to study these records; we didn't have time.

Q I understand that, but you did take some records?

A Yes sir.

Q Now, there was no evidence of any accelerant having been applied to any of these records, was there?

A No sir.

Q There was no evidence of any accelerant having been applied to the office, was there?

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A No sir.

Q Do you recall whether it was necessary to open a door to enter the office or not?

A No sir; I do not.

Q Now, in the room on the second floor other than the office did you take any records from that room?

A You're speaking of the large room?

Q Yes sir.

A Yes sir; we did.

Q All right. Was there any evidence of any accelerant on those records?

A No sir.

Q Was there any evidence of any accelerant having been applied to anything in that large room?

A No sir.

Q Now, I take it then that the records from the office and the records from the large room were comingled; by that I mean they were put together?

A Yes sir.

Q They were not kept separate?

A No sir; they were not.

Q Now, after making your examination on the second floor did you and Officer Aubrey then proceed to

the third floor?

A Yes sir.

Q And tell us what that consists of; does it—is it layed out the same way that the second floor is by having a hallway that separates the rooms on the third floor?

A I don't recall seeing an office on the third floor.

Q No, no; by that I mean was there a hallway separate from the rooms on the third floor, if you recall?

A I am not sure. I don't know. I just don't know—can't remember.

Q All right; what if anything—how many rooms were there on the third floor, if you recall?

A The best I can recall there was one large room.

Q One large room?

A On the third floor.

Q Yes sir.

A One large room, the best I can recall.

Q And what if anything did you remove from the third floor?

A There was some, what we would say

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records and papers that we picked up and put with the other group of evidence that we had.

Q Comingled with the other that you got from the second floor?

A That's right.

Q Now, there was no evidence of any accelerant having been applied to those records?

A No sir.

Q There was no evidence of any accelerant having been applied to the room on the third floor from which these records came?

A No sir.

Q Now, getting back to the point when you first arrived at the scene, do you recall where you came from?

A Yes sir; my home.

Q Do you recall who you talked to that asked you or who asked you to come to the fire?

A I received a call through our radio room and, uh, which the Battalion Chief on duty is the one that actually called for an arson investigator.

Q Who is the Battalion Chief or who was the Battalion Chief on duty that night?

A Captain Frank Morgan.

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Q Captain Frank Morgan is formerly or was formerly a member of the Arson Squad, was he not?

A That is true.

Q He put the call in?

A Yes sir.

Q Was he still on the scene when you arrived?

A Yes sir.

Q And did you speak to him before you and Aubrey entered the building?

A Yes sir.

Q And from him you gathered his opinion, I take it, that the fire was, in his opinion, a set fire?

A In his opinion it was set; yes sir.

Q All right; and what if anything other than his opinion did he tell you or what was the basis of his opinion, did he tell you?

A By the number of separate fires that, uh, when he entered the second floor from the rear exit, he saw a wall of flame up at the north end of the building.

Q He told you that?

A Yes sir.

Q All right; I want to be certain now. You have said that the fire had already been extinguished.

when you got there and this is the information that Morgan gave you?

A That's right; also there was a small fire in the large room area close to the south and west of the office. He told me of this and, in his opinion, there was no—they weren't related, no communication. They had to be separate fires; had to have been set separately.

Q Which would indicate arson?

A Right.

Q All right. Now, the premises were secured, I take it, by the Fire Department and the Police Department also present, were they not?

A Yes sir; that is true; yes sir.

Q No one other than officials such as police or firemen were permitted to enter that building, were they?

A That is true.

Q Did anyone suggest to you at that time that you obtain a search warrant from some magistrate, based upon the information that you had received from Captain Morgan?

A Would you repeat that?

Q Did anyone there at the scene suggest to you, any police officer—

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MR. LONG: (Interrupting) Your Honor, may we approach the bench?

BY THE COURT: All right.

(WHEREUPON, COUNSEL APPROACH THE BENCH AT THIS POINT.)

MR. LONG: As the Court has already ruled, this was an arson investigation and seizure of the records was legal. There is no need to have a search warrant in the Court's opinion and him going into this matter is just going to something which is now irrelevant. The Court is already ruled this a matter of law. The Court has determined this matter of law.

MR. HADDAD: I am not precluded, Your Honor, by the law from developing additional factual matter from this witness or any other witness in support of a renewed motion that I may make after this witness testifies. In other words, the law does not say that I can make only one motion to suppress. I can renew that motion at any time and to say that I cannot develop a factually—

BY THE COURT: (Interrupting) Well, I am going to let him answer.

MR. HADDAD: Thank you, Your Honor.

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(WHEREUPON, COUNSEL RETURN TO COUNSEL TABLES AT THIS POINT.)

Q Would you answer that question, please?

A No one suggested that—to get a search warrant; no sir.

Q You would have had time to do it with the premises still being secured, would you not?

BY THE COURT: Well, I am going to sustain the objection to that.

MR. LONG: Yes sir.

BY THE COURT: Now, the Court has already ruled on it.

Q Now, after you and Officer Aubrey put these records together, you say you wrapped them in a fire coat?

A Yes sir.

Q That was just used as a container to carry them out of the building?

A That is correct; yes sir.

Q And were they turned over to Mr. Aubrey at this point or did you accompany him?

A I accompanied him to Police Headquarters and we, together, stored them in his office.

Q When you arrived at his office and

examined these records is it not true that you found records in here that did not pertain to any of the businesses that were being conducted in that building?

A I don't understand your question.

Q Did you obtain records, some of those records that you took, oh, they were records of businesses that had been conducted by other people elsewhere, were they not?

A I don't know. We did not take time to study those records.

Q All right. Well then, you say, or you said on direct examination that when you arrived at the scene of a fire you investigate for any evidence of arson and in some instances you take records?

A That's right.

Q Do you recall when the last incident was in a fire other than the one in question here that you had taken any records from?

A I don't recall the last one, but I do recall other fires where we took records.

Q You mean since this fire?

A Not since this fire. I don't know of any since this fire off hand.

Q All right. Now, when did you determine

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then, if you made no examination of these records, when did you determine that they had nothing to do with the fire?

A We went back to the fire scene to continue the investigation. By that time we did have two of our personnel there that had arrived.

Q Wait a minute now; you and Aubrey had taken the records to Police Headquarters?

A Yes sir.

Q Did you look at them at Police Headquarters?

A Just briefly. We were in such a hurry to get back to the scene and we had a lot of work to do there.

Q All right. Did you examine these records to the extent of determining, uh, or what did you examine them for there at Police Headquarters; that's what I want to know.

A We did not take time to examine them.

Q You just looked at them?

A Just merely put them in there and left. We had a tremendous amount of work to do at the fire scene, pictures to be taken and a number of other things that had to be done.

Q So, you left them with Aubrey and he put

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them—

A (Interrupting) No sir.

Q (Continuing) In the cabinet there?

A We together put them in that room and locked the door.

Q In other words, they were in a room in the Louisville Police Department and the door to that room was locked?

A That is correct.

Q Now, you say, "we locked". You didn't have a key to it, did you?

A All you do is pull it to and it locks automatically.

Q You don't or didn't have a key to that room yourself?

A No sir; I did not.

Q All right; after that you went back to the scene?

A (Witness nodded head affirmatively.)

Q All right. Now, when was the next time that you saw the records that you removed from this building?

A It was when I took those records over to Mr. Schroering's office, the Commonwealth Attorney.

Q How many days after the fire?

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A Approximately five.

Q Approximately five?

A (Witness nodded head affirmatively.)

Q Do you have any records or notations or office memorandums that indicated the time that you had taken those records over to Mr. Schroering?

A I don't, no.

Q Before taking these records to Mr. Schroering did you examine them again?

A No sir.

Q So, you never did get the opportunity to examine these records to determine whether or not there might have been a business shortage of some type as a motive for this fire?

A There was a reason why I did not examine them.

Q I beg your pardon?

A There was a reason why I did not have to examine them.

Q Well, my question is you did not examine them?

A No sir.

Q What is your reason then; go ahead and tell the jury about the suspect that was arrested?

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A Yes sir; later on the same day of the fire we arrested a subject, Allen Hooper, and charged him with setting that fire.

Testimony of William Foushee

Q So there will be no mistake about it, Mr. Gargotto was never charged in setting that fire, was he?

A No sir.

Q He was never arrested on that occasion, was he?

A No; no sir.

Q Now, did you discuss these records with anyone else from the time that you and Aubrey left them in that room until the time that you took them to Mr. Schroering?

A Yes sir; I did.

Q With whom?

A With two agents of the Internal Revenue.

Q All right; and where did that interview take place?

A They came, the two agents came to my office. They asked me about the records and I told them where they were and they asked if I had any objection to them looking at the records and I said definitely not and I called Sergeant Aubrey and told him that as far as I was concerned that they could look at these records.

Q Do you know who those two agents were?

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A Yes sir.

Q Name them, please.

A Agent Frank Coots and Lou Crutcher.

Q Did you accompany them there?

A No sir; I did not.

Q All right; did they obtain copies of these records?

A I don't know.

Q When you—five days or approximately five days later, how did you get these records back?

A I talked to Mr. Schroering, the Commonwealth Attorney and then later I put these records on a cart and took them to his office as he had told me to do.

Q Over where?

A I put 'em on a cart and took them to Mr. Schroering's office as he had told me to do. I put them in his office right beside his desk

Testimony of William Foushee

Q Did you get any receipt for those records when you took them there?

A No sir; I did not.

Q Were the records enumerated or identified in any way?

A Not that I recall.

Q When you received them back from Mr.

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Aubrey they had already been looked at by the two agents you named; had they been placed in any container?

A A cardboard box.

Q So, you couldn't possibly identify the records from their contents then, could you?

A You mean that day? The only thing I did was pick them up and take them up to the office.

Q You don't know whether all of the records that you ultimately or that you initially took to the Police Headquarters were still there when you removed them, do you?

A No, no sir.

Q What time was it that you arrested Mr. Hooper—was that his name?

A Yes sir.

Q What time was it—first of all, the date of the fire, give us that.

A March 22nd, 1969.

Q March 22nd, 1969; was it after midnight? In other words, the early morning hours of March 22nd?

A Yes.

Q All right. Now, you arrested Mr. Hooper that same day then; is that correct?

A That is correct.

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Q And how many days after that was it before Officer Aubrey called you and asked you if the Internal Revenue agents could look at these records?

A Mr. Aubrey didn't call me.

Q Who called you?

A Mr. Coots.

Q All right. Well, how many days after that arrest of Hooper was it that Mr. Coots called you?

A The fire was on Saturday morning and on Monday morning I talked to Agent Coots and Agent Crutcher.

Q And you say by that time you knew that the records had nothing to do with the fire?

A Yes.

Q The fire had been in the early morning hours of Friday?

A No sir.

Q What was it then?

A The fire was reported March 22nd, 1969, at 8:12 a.m.

Q 8:12 in the morning?

A That's right.

Q So then, that was Friday morning at 8:12, so all of these events happened after that?

A Saturday morning.

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Q Now, so it was Saturday morning then—Saturday morning would be the 22nd?

A Yes sir.

Q All right. When was it you said that Mr. Gargotto called and said that he had heard that you had removed some records from his place?

A He called me a week after the fire.

Q And what did you advise him at that time?

A I told him I had taken the records and I had turned them over to the Commonwealth Attorney, Mr. Schroering.

MR. HADDAD: That's all; thank you.

REDIRECT EXAMINATION BY MR. LONG:

Q Did Mr. Gargotto tell you these were his records when he called you?

MR. HADDAD: Objection.

A Yes.

MR. HADDAD: Object, if Your Honor please. He didn't know if he had any records; he was calling him to find out if he had any.

BY THE COURT: Well, I will overrule the objection.

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THE WITNESS: He said, "I understand that you had taken some of my records," and I said, "Yes, we did, but now they are in the Commonwealth Attorney's office; he has taken them over."

MR. LONG: I believe that's all, if Your Honor please.

RECROSS EXAMINATION BY

MR. HADDAD:

Q At no time did you ever show these records to Mr. Gargotto for him to identify, did you?

A No sir; I did not.

MR. HADDAD: That's all.

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MR. JOHN E. AUBREY, called as a witness, by the Plaintiff, having been duly sworn, was examined and testified as follows, to wit:

DIRECT EXAMINATION BY

MR. LONG:

Q Would you state your name, please, to the Court and Jury?

A John E. Aubrey.

Q And where do you live?

A 1206 Ellison Avenue, Louisville, Kentucky.

Q By whom are you employed?

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A Louisville Police Department.

Q What are your duties with the Louisville Division of Police?

Testimony of John Aubrey

A I am the Communications Sergeant at this time.

Q What have been your duties?

A Prior to this I worked in Intelligence.

Q What were your duties in Intelligence and for what period of time were you in Intelligence?

A In September last, back for about four years I worked as a detective, and the last year of that period as a sergeant in Intelligence in the Louisville Division of Police and our primary goal was to gather information on organized crime and criminal activities in the City.

Q How long have you been a policeman?

A Ten years.

Q And what is your title now?

A Sergeant.

Q Sergeant; directing your attention to around March 22, 1969, did you have occasion to arrive at a scene of a fire on Jefferson Street?

A That is correct.

Q Could you tell the jury what you

observed when you arrived at the scene of this fire and where it was?

A It was in the 200 block of West Jefferson Street.

Q More specifically, the exact location.

A 238 West Jefferson Street; it was a three story building, and on my way to work that morning going west on Jefferson I, of course, had rode by the firemen fighting the fire and once I got to work and took care of the administrative details that had to be done I picked up a detective car and went back to the scene.

Upon arrival there Lieutenant Foushee of the Arson Squad, oh, I noticed him at the scene and we had worked together prior to this and we spoke and he asked me if I would mind going in with him and that he suspected arson in this particular case, and help him pick up some things that he wanted to seize as evidence.

Q Did you assist him then?

A Yes sir.

Q Did you go with him through the building?

A That's correct.

Q Did you go on the first floor of the building with him or—

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A (Interrupting) We went to all three floors.

Q All right; did you go through the first floor with him?

A That is correct.

Q Did you pick up any evidence or anything on the first floor, uh, these records?

A No sir.

Q Where did you go then?

A We proceeded to the second floor which—uh, the front portion, or the portion that faced Jefferson Street, I believe was like a small office and the back portion was a large room with a number of tables and chairs and had what appeared to be a counter-type affair with drawers behind it.

We had an old fire coat, or a fire coat and he would pick up or point to different things that he wanted put in this fire coat and we just stacked it all up and wrapped it up and brought it out.

Q What type things did he pick up or tell you to pick up, or point to?

A Well, they appeared to be gambling records or, uh, the way that you would keep track of how people bet on horses, or on specific races or anything; something like that.

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Q Well, were these file folders or scattered papers or what? Tell the jury where the papers were, the records you seized.

A Well, we picked up a paper or records—the stuff we picked up was both in the office and out in the large room on the second floor and I believe we found some up on the third

floor, but most of them were in pad-type forms and they were wet.

Some of them had been pretty close to the flames themselves and were scorched, brown, burnt, and at the time I really wasn't too sure what we was picking up because Bill was talking, "We will take this; we will take that", and I was just helping him grab it, throwing it in the fire coat.

The firemen were still there. They had the fire knocked out, but they were still in there with the hoses.

Q You say some of these records were scorched or—

A (Interrupting) Yes sir; some of them, you can tell where they had been burnt and been close to the flame.

Q How could you tell that? What did you see?

A They were brown, just like—you know, scorched paper.

Q And you placed those in the fire coat?

A That's correct.

Q Did you take these records from the second and third floors?

A That's correct; to the—I am positive we got them out of the front office and out of this large room where the tables and chairs were and where this counter was on the east wall of the building, I believe it's drawers in it and we—Bill opened the drawers or we opened the drawers and got the records out and I am sure we got some things off of the third floor, but I don't recall what quantity.

Q What did you do then?

A Uh, for Bill's convenience, he asked if I would take it down to my office. We had—we let our own office in the Police Headquarters at Seventh and Jefferson, and secure the records for him. He was still conducting the investigation and I believe later on that afternoon he arrested one subject.

Q Did he place these records in your office?

A Him and I, physically, took them to my office and casually went through them and we locked the

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office. He went back to the scene of the fire and I had other details that I had to take care of that day.

Q What did you go through at that time? Did you look or examine closely?

A Just casually to see what they were and it was very apparent from looking at them that they had something to do with gambling or betting on the horses, et cetera.

Q And then Lieutenant Foushee left you then; is that right?

A That is correct.

Q Then what happened next with regard to—

A (Interrupting) Well, that day nothing really happened to them. I think probably the next day, Sunday, I contacted Agent Frank Coots with the Internal Revenue Service and just advised him that—what had transpired the day before and that I thought they may be interested in looking at these records, but that the records were not under my control. They were under Lieutenant Foushee's control and he had to get permission from Lieutenant Foushee to look at them.

Q Uh, not under your control, but they were in your custody?

A They were in my custody, but I hadn't

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seized the records. I had helped Lieutenant Foushee, at his direction.

Q What happened next; did Internal Revenue Agents visit your office?

A Then, Lieutenant Foushee called me, I believe next day and said it was all right to let Mr. Coots, and I believe Mr. Brutcher or Crutcher come on over and to go through the records and, if they wanted microfilm on it, it was okay and the next day, I believe it would be a Monday they came over with equipment and copied all of the records.

Q And what happened after that; were you present when they copied the records?

A Yes sir.

Q Did they go through the records at that time?

A They went through every piece of paper that we had.

Q What occurred next?

A Some time after that, a number of days after that—uh, I wasn't in the office, but the assistant chief of detectives let Lieutenant Foushee and another fireman come in and take the records to the Commonwealth Attorney's office.

Q At that time they took them from you and

gave them to the Commonwealth Attorney?

A I wasn't present physically when they took them, but I was told later that Major Dodge unlocked the office for them.

MR. LONG: I believe that is all, if Your Honor please, of this witness.

CROSS EXAMINATION BY

MR. HADDAD:

Q Were you on the scene when Foushee arrived or did you arrive afterwards?

A When I was going to work I did not notice him at the scene. When I finally got to work and, you know, had roll call and got a detective's car and come back and got out of the car I seen Lieutenant Foushee over in front of the building.

Q You didn't stop at the scene of the fire on your way to work; you just passed it; is that correct?

A Right; that's correct.

Q Now, when you got to the scene of the fire was there any other officer with you?

A No sir; I was by myself.

Q And that's when Foushee asked you to go in and look the premises over with him?

A He asked me to go in and help him pick

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up some things that he wanted to take out. He first told me that he suspected arson, either he or the Captain on the scene had told him that they suspected arson and that he was conducting an investigation and asked if I would help him.

Q All right. So that there will be no question, neither you nor Foushee had any search warrant when you went in there?

A No sir.

Q Did anyone accompany you all to the second floor?

A Well, all of the time we was in the building there was an unknown number of firemen in there still using the hoses and the axes. The fire had been beat down, but they were still throwing water.

Q The premises were in control of the Fire Department?

A That is correct.

Q On the second floor you say that you or Foushee, one, took some records from a drawer in this office?

A Well, the front part is an office.

Q Yes.

A And it had a desk in it and it had, the best of my recollection, it had a cabinet in it, metal cabinet, I believe.

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Records were taken from this area and records were taken from a large area in the rear on the second floor.

Q And some from the third floor?

A The third floor—best I recall, was—had some type of storage area up there and there may have been some tables and chairs, but I am not too sure.

Q How many people were in the Intelligence Division at that time when you were working there, the total number of people?

A One Lieutenant and four detectives.

Q The total number of people would be six then?

A Five, one Lieutenant and four detectives.

Q Oh; you were one of the four then?

A I was a detective.

Q So, there would be five of you altogether?

A That is correct.

Q Did you work different shifts of the day?

A That is correct.

Q When you and Captain Foushee got to the Police Headquarters you didn't look, if I understood you, oh, you looked atsome of these records while you were there on the second floor and in the building and you thought that

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they were gambling records?

A Well, Foushee would point out what he wanted put in this old fire coat.

Q Yeah.

A And just casually, glancing at 'em as you picked them up, they appeared to me to be gambling records which I had seen before from previous investigations.

Q Not these same records; you mean other gambling records?

A That is correct.

Q Now, when you got down to Police Headquarters you and Foushee, with the records and went into the Intelligence Office there you and Foushee did look through the records?

A We probably spent a small amount of time casually looking at 'em just to see what we had, and Lieutenant Foushee went back to the scene of the fire, I think, and I had other things to do and I left the building.

Q All right. Now, what did you see in those records there at the time you looked at them that would indicate to you that there was any federal offenses that had been committed?

A Well, from my experience in the Intelligence Unit I am well aware of the federal wagering

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tax laws and et cetera and from previous investigations on other ganblers and handbooks in the city of Louisville and

seeing that type of evidence before, it appeared to be similar to what had been seized in other raids.

Q But there wasn't—you couldn't tell by looking at this evidence that any federal crimes had been committed, could you?

A No sir.

Q Did you look at these records any more that night after you got back to Police Headquarters after you and Foushee had left?

A I don't recall, sir. You mean that day, that specific time?

Q Yes.

A I am sure I was in and out of the office. As far as spending a specific amount of time searching the records, I didn't.

Q Did you work—was it Saturday that you called Coots?

A I believe it was the next day, the best I can recall.

Q Which would be Sunday?

A Yes sir.

Q Did you work on that Sunday?

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A I am not too—as far as putting eight hours on the book, I don't believe so. I don't recall whether I went to the office that day or not.

Q Where did you call Coots from?

A Probably my home.

Q And you hadn't looked at the records any more than what you had looked at them on that occasion that you just told us about?

A That is correct.

Q Now, the next day, or rather Monday, was that when Coots and Brucher—was it Brucher and Coots?

A I believe Mr. Coots and Mr. Brucher came over after I had got a phone call from Lieutenant Foushee.

Q All right. Now, those records remained in the room there; they weren't locked in any safe or anything, were they? Is that—

A (Interrupting) No sir; they was locked in a small room about ten by ten.

Q This—that is used as an office for the Intelligence people, right?

A Right.

Q And people were going in and out of that room all the time as far as the Intelligence officers, is

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that right?

A This particular period we are talking about from Saturday to Monday it is almost certain I would have been the only one in there because everybody else was home or off.

Q Do you know that for sure or are you just guessing?

A I didn't stand at the door 24 hours a day and make sure they didn't have access, no.

Q So, others did have access?

A That is correct.

Q Now, on Monday when Brucher and Coots came there did you assist to them in making copies of all of these records that were in there?

A I don't know what you mean by assist; my partner and I were both there.

Q Where were the records made; where were the copies made?

A Right there in the office.

Q In whose office?

A In the Intelligence office.

Q And is there a copying machine in there?

A They brought their own copying machine.

Q And you said a moment ago that they

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copied everything?

A Every piece of paper we had there they run through that machine.

Q And you permitted them to take those copies with them; is that correct?

A That is correct.

Q Then, as I understand it those records remained there in that room for some days after that?

A Less than a week, I believe. I am not sure of the exact dates; a number of days later they were turned over to the Commonwealth Attorney.

Q During that week there were people in and out of that room, were there not?

A People that work out of that particular squad.

Q Were you there when Foushee picked the records up?

A No sir.

Q You brought them in there in a coat. Were they ever put in any other container?

A I believe we found some old cardboard boxes and put them in, uh, you know, and sent the coat back to the engine company or wherever they got the coat.

MR. HADDAD: That is all.

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REDIRECT EXAMINATION BY MR. LONG:

Q Let me clear up something; when you were at the scene of this fire with Lieutenant Foushee were you looking for gambling records?

A No sir.

Q Or were you picking up papers that he directed you to pick up?

A That is correct.

Q And he asked you to assist in an arson investigation?

A That is correct.

Q Do I understand that when you picked up these records you observed them to be gambling records or you thought they were?

A In my opinion I thought that they probably were.

Q And that's from your experience as a policeman?

A From being in on raids on other handbooks and from

seeing that type of paraphernalia, it appeared to me to be similar to what we had used as evidence in other gambling trials.

Q But you did not go through this to search

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for gambling records?

A No.

Q Is this door to your Intelligence Room locked?

A It's a double locked door.

Q When you got back to your headquarters that day with these records did you, from your casual observance of them, realize that they were gambling records?

A Well, again, they appeared to be similar to the same type of paraphernalia that we had taken out of other handbooks and they just looked like the type where they write down the bet and the track and the horse that's running and the amount that the person is betting and there was things that had names on them.

Q Did you advise Lieutenant Foushee at that time?

A Well, he was there when we both casually went through them.

MR. LONG: That's all.

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RECROSS EXAMINATION BY
MR. FRANK E. HADDAD, JR.

MR. HADDAD: Did you comment to Lieutenant Foushee at that time when you all were up there when these records were being accumulated that these looked like gambling records to you?

MR. AUBREY: You mean at the scene of the fire?

Q Yes.

A No, sir.

Q You didn't say anything about what they appeared to be to you at that time?

A There really wasn't much talking going on. You have got all these firemen in the building with these hoses and Lieutenant Foushee is saying, "I want to take this", and he wants to take that and you know, there's no time to converse about what we were picking up. I was doing what he wanted.

Q And how many keys are there to that room at the Intelligence Bureau?

A The Lieutenant and the four detectives and the Chief of Detectives.

Q Now, when you looked at these records, again, you say you saw that they were just gambling records and you couldn't tell whether any offense had

been committed or not by these records, could you?

A Just by looking at the records?

Q Yes.

A No, sir; I couldn't.

MR. HADDAD: That is all.

REDIRECT EXAMINATION
BY MR. GEORGE J. LONG

MR. LONG: Tell the jury when you were there with Lieutenant Foushee, you say there were firemen running all around?

MR. AUBREY: They were still in there battling—uh, the fire had been knocked down, but they were still putting water on spots, apparently hot spots and they had axes in there, taking the walls apart, getting at any flames that was between the walls.

Q How many firemen were in there, about?

A It was a two-alarm fire, sir; I honestly don't have any idea.

Q Tell the jury roughly how many firemen go or what is a two-alarm fire? Now, you know and I'm sure they don't know and I don't.

A Well, I'm not a fireman; I just know

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that on a two alarm fire downtown I would guess maybe nine pieces of equipment will respond.

Q Quite a bit of equipment then and personnel?

A I guess so; they had the whole block surrounded.

Q That is a major fire then; that is not just one unit going?

A No, sir; the whole building was gutted inside.

Q Now, would you say that the scene there on the second floor and the third floor was confusion or confused at this time?

MR. HADDAD: I'm going to object to the leading of his witness.

BY THE COURT: Well, I'll sustain that.

Q Well, tell the jury what the scene looked like so they will know?

A Well, it's the first time I have ever been inside a place that was being battled by the firemen, uh, with the firemen. I have seen them a lot of times on the outside as a traffic, motorcycle officer for years, but I stuck real close to Lieutenant Foushee.

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Q Were there many or few policemen present?

A The police were on the outside directing traffic and of course, District Officers were, you know, close to the scene of the fire themselves which is normal. We had one or two ranch wagons with stretchers standing by in case any men were injured.

Q Were the hoses stretched inside the building?

A They were inside with water; they were fighting the—fighting the hot spots with water.

Q Up on the second floor?

A Second floor and third floor.

Q While you were attempting to pick up records?

A We was right in the middle of them.

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MR. LONG: Call Special Agent Coots.

MR. FRANK S. COOTS, called as a witness, by the plaintiff, having been first duly sworn, was examined and testified as follows, to-wit:

DIRECT EXAMINATION

BY MR. GEORGE J. LONG:

MR. LONG: Would you state your name, please, to the Court and jury?

MR. COOTS: My name is FRANK S. COOTS.

Q And where do you live?

A I live at 1905 Trevillian Way, Louisville, Kentucky.

Q By whom are you employed?

A I'm employed by the Intelligence Division of Internal Revenue Service here at Louisville.

Q Now, how long have you been so employed?

A Approximately twenty years.

Q What are your duties as an Intelligence Division Agent with Internal Revenue Service?

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A The duties of a Special Agent with Internal Revenue Service are to investigate criminal features of tax investigations.

Q And what procedure do you use to do that roughly; just quickly, for the jury; I mean by that how do you go about your job?

A Well, we go about our job by gathering evidence to be presented in the court, such as we are in today. We develop cases, some of which information is turned over to the various other divisions of Internal Revenue Service for their use in cases.

Q And your division or section of the Internal Revenue Service is an investigative division; is that right?

A My division is primarily as a criminal investigator; yes, sir.

Q Did you have occasion back in 1969 to visit the local police headquarters in regard to some records?

A Yes, sir.

Q Would you tell the jury what happened, why you visited their headquarters and what you did there?

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A Yes, sir; it was on March 23rd of 1969. I received a telephone call at my residence from Detective John Aubrey of the Louisville Police Department.

He advised me that there were records in his office or boxes of papers and records in his office that had been removed from a fire that occurred at 238 West Jefferson Street in Louisville on the previous day and he said he called me because he thought that the Internal Revenue Service might be interested in examining those records.

He advised me that if I did want to see the records that I would have to contact Captain—I believe he was a Lieutenant then, uh, Lieutenant William Foushee of the Louisville Fire Department because they would be stored in John Aubrey's office, but they were actually records seized by Lieutenant Foushee.

Q And did you contact Captain Foushee?

A On Monday morning, March 24th, if I have my dates right—on Monday morning, March 24th, about the first thing I did that morning was to go to Lieutenant Foushee and ask him what had been taken from the fire and he said he hadn't examined them, but

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there were some records, papers and what-have-you that had been removed from the building, 238 West Jefferson Street.

I asked him if I could examine the records and he told me that I could. I asked him to call Sergeant Aubrey so that he would have authority to let me examine the records and Foushee did that in my presence and I went to Aubrey's office then and I did microfilm those records.

Q When you got to Aubrey's office who was there?

A Detective John Aubrey and Detective Bernie Highfield who worked with him.

Q And who went with you?

A Special Agent B. L. Brucher.

Q Now, were these records there at the office when you got there?

A The records were in the office of John Aubrey which was the Intelligence Unit of the Louisville Police Department.

Q And did you go through these records?

A I didn't attempt to analyze the records at that time. I went through them in that I took out records that appeared to be wagering type

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records and I ran those records on microfilm, but I made no effort to analyze the records at that time.

Q Did you—you did a quick examination of them?

A Right.

Q Did you separate these records that you microfilmed from other records that were there or did you photograph everything?

A I didn't photograph everything that had been taken from the building because there was some boxes and papers that would obviously be another business than that of Mr. Gargotto. I observed that there were those records there. I notified a Revenue Agent that he might want to take a look at those records. I believe we had another case actually being investigated at that time and I didn't photograph—

MR. HADDAD: (Interrupting) Objection, if Your Honor please.

BY THE COURT: Yes, we are not concerned with another case.

MR. HADDAD: May we approach the bench, please?

BY THE COURT: We are only concerned with this—with these gambling records

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that affect this case. The jury will disregard that.

MR. HADDAD: May we approach the bench, Your Honor?

(WHEREUPON, COUNSEL APPROACH THE BENCH AT THIS POINT)

BY THE COURT: You may make your motion.

MR. HADDAD: The defendant at this time moves to discharge the jury because the witness testified that there was other investigation going on at the time indicating that the defendant was suspected of other criminal activities.

MR. LONG: Now, if Your Honor please, before Mr. Haddad objected prematurely he was not going to say anything about Mr. Gargotto. There is another case that doesn't involve Mr. Gargotto, not involved in this case in any way, shape or form and has nothing to do with this. Now it doesn't affect this case in any way, shape or form.

MR. HADDAD: I am condemned if I object early and condemned if I object late.

MR. LONG: I just want the Court to know something about this case and he wasn't—

BY THE COOURT: (Interrupting)

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All right; I have admonished the jury.

(WHEREUPON, COUNSEL RETURN TO COUNSEL TABLES AT THIS POINT)

Q And did you microfilm these records yourself?

A I microfilmed the records myself with the help of Special Agent Brucher who mostly was handling the records.

Q I will hand you this and ask you to look at it, please, sir.

(WHEREUPON, THE WITNESS DID AS REQUESTED)

Q And what is this?

MR. HADDAD: Let there be an objection to the introduction or any testimony with reference to the microfilm as well

as the other—

MR. LONG: (Interrupting) I haven't introduced anything yet, Your Honor.

BY THE COURT: No he is objecting basically under the Fourth Amendment, correct?

MR. HADDAD: Yes, sir.

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BY THE COURT: Overruled.

Q I am asking what is it; what is this?

A All right; I recognize this box. It contains the microfilm that I microfilmed on March 24, in the office of John Aubrey and it is the records that I microfilmed in that office on that day.

Q Thank you; and how can you identify that, please, sir?

A It has "Anthony J. Gargotto" written on it that I wrote on it and it has, "Film of records removed by L.F.D.", which stands for Louisville Fire Department, "From 238 West Jefferson, Louisville, 3-22-69", which is the date they were removed, "Copied March 24, 1969", which is the date I copied them and it has my initials on them.

Q And you initialed it at that time?

A I did.

Q And those are your initials up there in the right-hand corner?

A Those are my initials.

MR. LONG: If Your Honor please, I move to introduce this microfilm copy of the records seized at the Gargotto premises or place of business as Government's Exhibit No. 4.

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MR. HADDAD: Same objection, Your Honor.

BY THE COURT: Yes, you have an objection, which is overruled; you may file them.

(WHEREUPON, A PACK OF MICROFILM ENTITLED "ANTHONY J. GARGOTTO" WAS MARKED FOR IDENTIFICATION AS GOVERNMENT EXHIBIT NO. 4 AND RECEIVED IN EVIDENCE)

Q Agent Coots, I will show you Government's Exhibit No. 1 and this has been introduced and ask you to look at those and tell the jury what they are?

A These are Forms 730, filed by Anthony—or, copies of Forms 730, I should say, filed by Anthony J. Gargotto.

Q Well now, tell the jury what a Form 730 is; I'm sure they don't understand and I don't really, myself?

A All right; a Form 730 is an Excuse [sic] Tax Return.

MR. HADDAD: Excuse me; Your Honor please, we have a continuing objection to this

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exhibit as well?

BY THE COURT: Yes.

MR. HADDAD: Thank you.

THE WITNESS: A 730 is an Excise Tax Return. It is required that it be filed monthly by those individuals who are in the wagering business. It is a wagering tax return and it requires that a tax be paid on wagers accepted, in the amount of ten percent of the wagers accepted.

Q Now, what wagers are supposed to be reported; the gross taken in in betting?

A All of the wagers received or accepted are to be reported on that Form 730, on that Excise Tax Return; yes, sir.

Q And does the taxpayer figure his own tax?

A The taxpayer figures his own tax and files the return and notes it on the return.

Q In other words, puts down his gross on that form, the money?

A That form contains the gross amount of wagers accepted and then it has the place for the tax to be computed and the tax is simply ten percent of the gross wagers accepted.

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Q And then he files that?

A He files that. Back at this time I believe it was filed

with the District Director of Internal Revenue at Louisville and later they were filed with the Central Service Center, the same as you people do your Federal Income Tax Returns.

Q I hand you Government Exhibit No. 2 and look at that and tell the jury what that is, please sir?

A I won't give you the form number, but it's a Certificate of Assessment and Payments and it is just what the name implies. It is the Certificate of Assessment and Payments and this particular one is a form filled out for Anthony J. Gargotto and it has to do with Excise Tax Returns and tax payments made to the Internal Revenue Service in connection with those excise tax returns; it is a certification of payments.

Q And that is a form that is maintained by the Internal Revenue Office; is that right?

A A form that is prepared when it is requested; yes, sir.

Q Kind of a summary?

A It's a summary of the tax paid and of

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the returns filed.

Q Referring to your records there, was a return filed for February-July of 1969?

A According to the Certificate of Assessment and Payments that I just referred to, there is no record of a return having been filed for the monthly period of July or February, 1969, or of July, 1969.

Q All right, sir; I hand you Government's Exhibit No. 3 and ask you to confine your review of this to just this section here (indicating) which I have folded back?

A Just these (Indicating)?

Q Just those, and ask you what that is; tell the jury what that is, please?

A All right; this is a special tax return and application for registry, wagering, for the fiscal year ending June 30, 1969, and it is a copy of it, filed by Anthony J. Gargotto.

There is also included here an amended return for that same period and apparently the amended return was filed because there was a change of address from—it doesn't say what address; there is supposed to be a business address stated on it. There is no

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business addresss on the original return filed.

This is an amended return and it states for change of address and the addresss is 209 West Jefferson there on the amended return.

Q Tell the jury what it is?

A All right; it's an application for registry for the wagering occupational tax and I'll try to explain to you what that is. The Internal Revenue Service requires that individuals who are in the wagering business file with the Internal Revenue Service an application, which this is, for a wagering tax stamp which registered them as a person in the business of accepting wagers and it is an application for a Fifty Dollar Wagering Tax Stamp.

With this return, if it is for a full year, requires the payment of fifty dollars which is a payment for a tax stamp for the year.

MR. LONG: Okay; I believe that's all.

* * *

CROSS EXAMINATION BY
MR. FRANK E. HADDAD, JR.

MR. HADDAD: Mr. Coots, you gained your first knowledge that records had been

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taken from Mr. Gargotto's premises on Saturday, by a telephone call from Mr. Aubrey?

MR. COOTS: On Sunday by a telephone call from—

Q (Interrupting) Sunday?

A That's right; this was the date of the fire, I believe; I believe the fire was on Saturday.

Q That's right.

A And I received the call the following day.

Q And did you contact Foushee at that time or did you go to his office?

A I did not contact Foushee at that time. I waited until Monday morning and reported to the office and from there went right to Lieutenant Foushee's office.

Q All you knew was that records had been taken from the premises?

A That's all I knew.

Q At that point?

A I didn't even know what they were.

Q Now, when you went down to the Police Headquarters with the permission of Mr. Foushee and Mr. Aubrey who exhibited these records to you, in

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looking at these records you could not tell that there was any federal offense having been committed at that time, could you?

A No, I couldn't tell at that time.

Q You, in other words, you could not—

A (Interrupting) I didn't have the tax return, so I couldn't possibly have known.

Q So, you could not tell at that time whether these records were instrumentalities used in the commission of a federal crime, could you?

A I had no way to know at that time if a crime had been committed.

Q And then what you did was to copy, by the microfilm method, all of the records that you could determine pertained to some type of gambling?

A That is what I did.

Q There is no particular federal offense against gambling that you were looking for at that time?

A No, I had no reason to know at that time that a violation had occurred.

MR. HADDAD: That's all; thank you.

MR. LONG: That is all of

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this wintess, if Your Honor please.

BY THE COURT: All right; you may stand aside.

ORDER

(Entered November 30, 1973)

This case came on for hearing in chambers on October 25, 1973, at 2:00 p.m. pursuant to the order of the United States Court of Appeals for the Sixth Circuit on mandate issued May 21, 1973, and there appeared Honorable George J. Long, United States Attorney, and Honorable Frank E. Haddad, Jr., counsel for the defendant.

Testimony was heard from Captain William A. Foushee and Detective John Aubrey on behalf of the Government; and from Frank S. Coots on behalf of the defendant, respectively.

Upon conclusion of all the evidence, and oral arguments having been heard,

IT IS ORDERED that the exigencies of the situation justified Captain Foushee's decision to seize the records in the desk drawers and filing cabinets without first seeking a search warrant.

Findings pursuant to the remand will be entered by the Court.

BY ORDER OF COURT:

JAMES F. GORDON,
United States District Judge

DATED: NOVEMBER 30, 1973

FINDINGS PURSUANT TO REMAND

On Thursday, October 25, 1973, an evidentiary hearing was held in this matter to ascertain:

> (a) whether or not the exigencies of the situation existing at the time the search was extended to the desk drawers and filing cabinets were such as to justify the search and seizure of their contents without a warrant.

And further, *if not* justifying such search and seizure, then to hear evidence and decide:

(b) whether or not the papers found in plain view can be identified and segregated from those removed from the drawers.

A transcript of this hearing has now been transcribed and is a part of this record, along with certain photographs and samples of the documents involved.

Since we conclude that the exigencies of the situation did in fact justify the question search and seizure under (a) above, and that such is dispositive of the issues, we find it unnecessary to take evidence as to (b) above.

Finding of Facts

(1) The Louisville Fire Department answered the call of the fire in question at approximately 8:20 a.m. on a Saturday morning in March, 1969. The location in question was an old multistory brick building in a run-down business district in downtown Louisville. More than one alarm was issued, and in all 75 firemen and 15 pieces of fire fighting equipment were utilized in bringing the conflagration under control. The fire department devoted its efforts toward the situation for five hours before vacating the premises as safe. The photographs filed as exhibits graphically depict the intensity and seriousness of the fire itself and its obvious capability for vast destruction had it not been efficiently arrested.

(2) Captain Foushee, chief of the arson squad was promptly summoned to the scene and arrived within 20 to 30 minutes after the first fire fighting equipment on the scene. The pattern of the flames and their burning upon the floors and steps as described by Captain Foushee in the transcript indicated to him the extreme probability of arson and justified his taking steps to protect any and all evidence, both as to the cause *of* the arson, as well as to the cause of *why* the arson.

(3) The Captain and his assistant, Sgt. Aubrey, visually discovered documents and papers strewn upon the floors of certain of the rooms. To us, it was reasonable that these

papers might have told the story of how (accelerant) the fire started and also why (cover of illegal activities) this set fire came about. Firemen were in the process at that time of actively extinquishing the flames. They were ripping out walls and floors, and had pulled open the drawers of the filing cabinets, partially distributing their contents upon the floors, searching for any substance that presented to them a risk of "rekindle" of the initial blaze, thereby preventing a repeated subsequent outbreak of the fire. Firehoses were upon the steps and in the rooms and in use, and water was leaking through the ceilings of the upper floors and into, onto, within, and upon the papers and documents in the file drawers and upon the floor. Captain Foushee knew that it was standard operating procedure for firemen in extinquishing a blaze of this type to remove combustible substances from the building by throwing or carrying them into the alleyways where the smoldering items could be hosed down to prevent danger of rekindle.

(4) In view of the above situation, we find Captain Foushee and Sgt. Aubrey had a reasonable and proper basis upon which to suspect arson, and to thus seize and protect any and all items that might lead to the solution of how and why same had been employed. Further, we find that the seriousness of the situation was so acute that it would have been unreasonable, if not dangerous, to order the fire fighting personnel to cease taking rekindling protecting steps while some person searched on Saturday morning for the proper authority to issue a warrant. We further find that, even if such action as the procuring of the warrant had been taken, the identity of the documents themselves would have been wasted away by their exposure to the activity of the fire fighting and the water and smoke.

Accordingly, we conclude that the answer to (a) above is "yes" and that the search and seizure was justified.

We further direct the Appellate Court's attention to the following facts for its consideration and answer to us. Though

there is asserted issue between defendant and the government as reflected in the evidentiary inquiry transcript, it appears to us that the convictions of the defendant on Counts 8 through 15 were in no way related to the seizure and search of the documents in question and that should the Appellate Court disagree with our conclusion here, such would not affect the validity of those convictions. Our sentence was five years on each count of conviction, all to run concurrently.

November 30, 1973

JAMES F. GORDON
United States District Judge

TRANSCRIPT OF PROCEEDINGS IN CHAMBERS

(October 25, 1973)

* * *

BEFORE HONORABLE JAMES F. GORDON, UNITED STATES DISTRICT JUDGE FOR THE WESTERN DISTRICT OF KENTUCKY, AT LOUISVILLE, KENTUCKY, ON THURSDAY, OCTOBER 25, 1973.

* * *

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(THE CAPTIONED MATTER WAS CALLED BY THE COURT AT ABOUT THE HOUR OF 2:00 P.M., IN CHAMBERS, AND THE FOLLOWING PROCEEDINGS OCCURRED:)

BY THE COURT: All right, gentlemen; as the Good Book says, of the two or three of us are gathered together, we are here for the purpose today of discussing the remand by the Sixth Circuit in the matter of the appeal by Gargotto in which the Sixth Circuit, in their opinion, directs me to hold an Evidentiary Hearing to determine:

(1) Whether the Exigencies of the situation were such at

the time the search was extended to the drawers of the desk and cabinets to justify such search, and, seizure of the contents without a warrant.

That is the first issue, and may be disposative of the entire matter. However, I am further directed that if I find no justification for extending the search and seizure without a warrant, then and in that event, I must hear evidence and decide whether the papers found in plain view can be identified and segregated from those that were removed from the drawers.

All right, gentlemen; I would assume by these questions,

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Mr. Long, that the burden is on the United States.

MR. LONG: I would assume so, Your Honor.

BY THE COURT: Call your first witness.

MR. LONG: Captain Foushee.

CAPTAIN WILLIAM A. FOUSHEE, called as a witness, by the Plaintiff, having been first duly sworn, was examined and testified as follows, to-wit:

DIRECT EXAMINATION

BY MR. LONG:

Q Would you state your name, please, for the Court?

A William A. Foushee.

Q And where do you live, sir?

A 9100 Wanlou Drive.

Q And what is your occupation?

A I am a Captain of the Arson Squad.

Q And of what?

A Louisville Division of Fire.

Q And that is the Louisville Fire Department?

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A Yes, sir; it is.

Q And your rank is Captain?

A Yes, sir.

Q How long have you been so employed?

Testimony of Captain William A. Foushee

A I have been employed with the Fire Department since October—or, since November 25th, 1953.

Q And how long have you been on the Arson Squad?

A Since October 8, 1958.

Q And what are your duties on the Arson Squad?

A Supervise all Arson investigations; uh, any kind of investigation that's related to our Department, including Arson investigation.

Q And what do the duties consist of?

A Of—to determine the cause of fires.

Q And how is that done, or what does your investigation consist of? Tell the Court how you conduct such an investigation?

A Well, we are called to the scene of a fire, normally, by the Commanding Officer in charge of the fire who believes the fire is of a suspicious nature. Sometimes he calls us on just an ordinary, undetermined fire, but generally, it's that they believe the fire was set, or in

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their estimation it was set. We first arrive at the scene of such a fire and the officer that called us normally tells us what he has found.

After he's—after we have talked to him then we try to determine a point of origin where the fire originated and if there is a possibility of more than one fire. After we find the point of origin and there is just one origin, we try to determine what in this area caused that fire—what in that area could be responsible for the fire.

Of course, if we have a fire where there is more than one origin on any one floor, or more than one floor, it's, uh, without any justification for it, definitely, it was a set fire; someone had to have set it.

Q And what do you look for, uh, for a set fire? What are the prerequisites for, uh, of a set fire?

A Relating to origin?

Q Yes.

A One of the flammible liquids more on a fire of incindiary origin, and, uh, probably most any other type of, uh, substances to accentuate the fire and we would look for inflammible liquid patterns. We would look for devices that could be used to have set the fire. Uh, if there

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is no odor of flammible liquid, we would go by the burn pattern, and by that, I mean for instance, if you pour flammible liquid on this floor, uh, from here to that door, uh, it should show and be very distinct that something had been poured there.

For instance, there shouldn't be anything on this floor from here to that door; something had to be put there to burn.

Q Well now, when you investigated this partic—uh, do you try to smell for a flammible liquid; is that what you do, or—

A Yes, sir; we do; we do. If care isn't used, generally you can determine, but if gasoline is used, many times the fumes has burned where there is no odor. Then, we have to go by the flammible liquid pattern, as we did in this case, at, uh, the area that's at the top of the stairs.

Q Well, let's don't get into that just yet. I'm trying to discover just how you continue your investigation. Now, in the investigation did you look for anything else, such records, or any material object that you could examine at a later time?

A Yes, we look for any evidence that may point to the person or persons that would have reason to set

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the fire to the building.

Q What—yes, what does that evidence consist of?

A It consists of records, uh, such as—well, any kind of records which, uh, in many times the person could be in a financial condition. He might have raised his insurance.

and anything in those records might have a direct bearing on the motive for setting the fire.

Q In other words, you look for insurance papers—records which may reflect insurance papers?

A Yes, sir; insurance.

Q Or financial—

A (Interrupting) Financial condition. It may be that the subject—the owner of the business, or the company—it could even be a dwelling, is about to go into bankruptcy.

Q Would it extend to also papers of that nature?

A Sir?

Q Letters and papers?

A Yes, sir. Now, the reason, we don't have time at the scene of the fire to go through each record. It's an emergency situation and we do not have time to sit down and look through each record to determine whether or not

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it is going to be important to an investigation of the case. We've got to get there and get what we can and get out because if we don't and we've got to do it very quick, the Fire Department, uh, after they arrive on the scene and extinquish the fire—and by extinquish a fire, I mean—

MR. HADDAD: (Interrupting) Excuse me; now, are we talking about this case, or are we talking about other cases?

MR. LONG: I'm trying to establish how he—I don't want him to go into this case yet. I want him to establish how he investigates an Arson.

BY THE COURT: Go ahead.

Q Don't go into this particular case yet Captain Foushee; just your basic investigation of an Arson investigation?

A Well, we would remove—going back to removing, uh, we'd remove any kind of device, uh, anything that would support the origin of a fire; any records or papers that would

show the motive for the fire; anything else that we might find that, uh, we would feel would relate to the, uh, either the origin of the fire, or that we could use to prove who did set the fire.

Q All right, sir.

MR. LONG: With the Court's

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permission, Frank, will you stipulate as to his educational background and his investigation?

MR. HADDAD: Yes, and he's heretofore testified to it anyway.

MR. LONG: That's all in the Record? Okay.

Q Captain Foushee, directing your attention to the Gargotto place of business on Jefferson Street—

A (Interrupting) Yes, sir.

Q Uh, about March 22nd, 1972—uh, '69, excuse me; did you have occasion to investigate that matter?

A Yes, sir; I did.

Q Would you tell the Court now what occurred on that day; what time you got there; what you saw and just what you observed?

A Well, the alarm fire was reported at 8:12 A.M., on March 22nd, 1969. The first piece of equipment arrived on the scene at 8:13.

MR. HADDAD: Now, what are you testifying from here now; not your knowledge, but what?

THE WITNESS: Official run ticket.

MR. HADDAD: What?

THE WITNESS: Official run

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ticket.

MR. HADDAD: All right; go ahead. You went there and you don't know though. You're just testifying to this from some records that you have there?

THE WITNESS: That's right.

MR. HADDAD: Okay.

Q Are those official records of the Fire Department?

A This is a photostat copy of the original run.

Q You use those; all right; go ahead.

A All right. At 8:17 a second alarm was sounded which brought additional equipment. At 8:28 Captain Frank Morgan called for an Arson investigator and I answered a request.

At 8:29 the third alarm was sounded. Now, I received a call around 8:20 A.M., and I would say it was approximately thirty minutes later that I arrived on the scene. The fire equipment was still present. The flames were, I would say, extinquished.

Now, that doesn't mean that everything is out and the firemen can go home. What it means is that just the flame is knocked down or is under control. I talked to

Captain Morgan upon my arrival and he gave me the information as to the reason why he called.

Going back to the—well, after arrival there, I talked to Captain Morgan. I then saw John Aubrey—Detective John Aubrey.

Q Who is he? Who is he employed by?

A Louisville Police Department.

Q What did you do then?

A Well, I was alone; there was no one with me to conduct this investigation at this time but just myself.

So, I asked Detective Aubrey if he would go with me and assist in the investigation, which he agreed to do. We went into the, uh, building at 238 West Jefferson by a door that, uh, opens out onto Jefferson Street.

Reaching this top of the stairway that leads to the second floor, there's a, uh, what you call it, a foyer, but there was a walkway around from, uh, there's a walkway around—all the way around the side of the stairs.

Q Now, what was the condition of this building as you went into it at this time, and this stairway?

A Well, it had been heavily damaged by fire, the entire building.

Q Was there smoke?

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A Yes, sir; there was smoke and there was water; firemen were in the building.

Q Were there fire hoses about?

A Yes, sir; there were.

Q Was the fire equipment out in the street?

A Yes, sir.

Q Was there firemen in the building?

A Yes, sir.

Q Approximately how many firemen if you can recall, were on the first floor as you went in?

A On the first floor? Uh, I don't know; there was no fire on the first floor of the building. There was a lot of water, but on the second floor there was a number of firemen there and also on the third floor.

Q All right. Now, you went up to the steps and let's begin—let's take it in sequence. You started, uh, went up the steps and in what condition were the steps in?

A They were charred.

Q And tell the Court what you mean by "charred"?

A They were—well, burned; the steps were burned and, uh, heavily burned and, uh, on the landing just, uh, on this area of the walkway around the edge of the

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steps there was evidence of a flammible liquid being applied to that area.

Q Do you have any pictures that were taken by the Fire Department of this particular scene?

A Yes, sir; I do.

Q Would you get those out?

MR. HADDAD: Now, as of what time were these pictures taken? If you know?

Q When were the pictures taken and what time were they taken? Now, let's get—let's look at them and get the ones that you're talking about.

(WHEREUPON, THE WITNESS HANDED COUNSEL A GROUP OF PHOTOGRAPHS AT THIS POINT.)

MR. LONG: You want to see them?

(WHEREUPON, MR. HADDAD EXAMINED THE PHOTOGRAPHS AT THIS POINT.)

Q Now, what time were these pictures taken, Captain Foushee?

A Photographer started taking them at 9:00 A.M.

Q All right, sir.

A On March 22nd, 1969.

Q Are these the official Louisville Fire

Department photographs?

A Yes, they are.

Q Taken by the Louisville Fire Department photographer?

A Yes, sir.

Q And they have remained in the custody of the Fire Department since that time?

A Yes, sir.

Q As well as you know?

A Yes, sir.

Q All right. Now, what is the first picture you have there?

A It shows—

Q (Interrupting) What does it depict?

A It shows the front of the building, the Gaslight Theater: first, second and third floors of the building and in

fact you can see either steam or smoke still coming out from the third floor area.

Q Does that picture reasonably depict the scene at the time you arrived?

A Yes, sir; it does.

MR. LONG: Your Honor; I would like to introduce this as a United States exhibit.

BY THE COURT: All right; I

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will mark it as Government Exhibit No. 1.

(WHEREUPON, A PHOTOGRAPH WAS MARKED FOR IDENTIFICATION AS GOVERNMENT EXHIBIT NO. 1.)

Q And the next picture you have?

A Uh, the next picture depicts, uh, covers practically the same area only a little closer shot and again, the first, second and third floors and it shows the fire equipment setting out in front—ladders and hose leading into the building, and I think if you'll look real close you can see steam or smoke, one, coming from the second floor there.

MR. HADDAD: You don't know whether it's steam or smoke.

THE WITNESS: No, sir; it looks like steam.

Q Does that photograph depict the scene at the time you arrived?

A Yes, sir.

Q Or close thereto?

A Yes, sir.

MR. LONG: Uh, United States Exhibit No. 2.

(WHEREUPON A PHOTOGRAPH WAS

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MARKED BY THE COURT AS GOVERNMENT EXHIBIT NO.2, FOR IDENTIFICATION.)

Q The next picture you have there?

A It's, again, a photograph of the same area only the photographer was standing at a different location, shooting at that area.

Q Does that depict here the scene at the time you arrived?

A Yes, sir.

MR. LONG: United States Exhibit No. 3. Do you want me to mark those?

BY THE COURT: No, I want it done right.

(WHEREUPON, A PHOTOGRAPH WAS MARKED BY THE COURT AS GOVERNMENT EXHIBIT NO.3, FOR IDENTIFICATION.)

Q Let's see; the sequence here, I just—Okay; does that picture you have that—uh, what does that depict?

A Again, the same area, including the other buildings nearby and, uh, additional equipment sitting to the left, and, uh, again it covers about the same area—the ladders and so forth.

Q Shows the scene of the Gargotto Fire,

right?

A Yes, sir.

MR. LONG: All right; No. 4.

(WHEREUPON, A PHOTOGRAPH WAS MARKED BY THE COURT AS GOVERNMENT EXHIBIT NO. 4, FOR IDENTIFICATION.)

Q The next picture you have?

A This was taken at the front, on Jefferson Street side, shooting toward the east. Again, it shows the apparatus and so forth.

Q All right; that shows the fire equipment apparatus with the—here, what is that thing there (indicating)?

A That's a—right here (indicating)?

Q Yes.

A That is called a Snorkel.

Q That is a piece of fire equipment raised up to the second floor, or third floor, right?

A Right, uh, it looks like it's to the second floor to me; maybe just a little bit above it.

MR. LONG: All right, sir; No. 5.

(WHEREUPON, A PHOTOGRAPH WAS MARKED 18.
BY THE COURT AS GOVERNMENT EXHIBIT NO. 5, FOR IDENTIFICATION.)

Q The next picture you have there?

A This photograph was shot toward the west. This also, uh, shows the building that was involved in the fire; also, uh, fire equipment at the—and the Snorkel, but I can't tell whether it is down—going down or up in that position.

Q All right, sir; just the same scene of the area?

A Yes, sir.

MR. LONG: That is Six.

(WHEREUPON, A PHOTOGRAPH WAS MARKED BY THE COURT AS GOVERNMENT EXHIBIT NO.6, FOR IDENTIFICATION.)

Q The next picture?

A The next picture, uh, is at the rear of—rear of 238 West Jefferson; it shows a picture of several pieces of fire equipment and also it shows the hook and ladder with the ladder extended to the third floor section.

MR. LONG: All right, Sir; that's Seven.

(WHEREUPON, A PHOTOGRAPH WAS MARKED 19.
BY THE COURT AS GOVERNMENT EXHIBIT NO.7, FOR IDENTIFICATION.)

Q The next picture you have there, sir?

A This is the stairway leading—that leads from the street up into the second floor of the building.

Q Now, is that the stairway that you traversed to get to the second floor?

A Yes, sir.

Q And does that picture depict the charred condition which you referred to a minute ago in your testimony?

A Yes, sir; it does.

MR. LONG: All right, sir; that will be Eight.

(WHEREUPON, A PHOTOGRAPH WAS MARKED BY THE COURT AS GOVERNMENT EXHIBIT NO. 8, FOR IDENTIFICATION.)

Q Let's see if you've got any more pictures that—you have seen these (To Mr. Haddad). Now, Captain Foushee, the second series of pictures which you have there, would you tell the Court what each one represents?

A This is the—

Q (Interrupting) What is that picture you've got; what it represents.

A This is the area as you come up to the

stairway to the second floor. You come to the landing and this is a width around the stairs that leads back into—uh, to an office door on this floor. There is—there was heavy burn patterns which indicate to me that in my opinion, the flammible—a flammible liquid was used at this point here (indicating).

Q And that picture is on the second floor, right?

A Yes, sir; it is.

Q All right, sir; that's Exhibit—United States Exhibit No. 9.

(WHEREUPON, A PHOTOGRAPH WAS MARKED BY THE COURT AS GOVERNMENT EXHIBIT NO. 9, FOR IDENTIFICATION.)

THE WITNESS: And this photograph shows the area as you come up the stairs and onto the landing and in this area

in here (indicating), and some over, uh, in this area (indicating), uh, well, again indicates to me that a flammible liquid was used.

MR. HADDAD: Second floor?

THE WITNESS: Yes, sir.

Q And that is based on what, the heavy burn marks; is that what you're telling the Court?

A The burn marks and the way that it is,

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uh, it's run down, uh, it has run down between the cracks in the wooden floor, uh, flammible liquid was applied to that. If a flammible liquid is applied to a wooden floor it will seep down between the cracks and many times, where the nails go through the floor, if enough is applied and it is an unusual burn, it's burning under the floor and on top of the floor at the same time and in this instance it had run down in the cracks and burned.

MR. LONG: United States Exhibit No. 10.

(WHEREUPON, A PHOTOGRAPH WAS MARKED BY THE COURT AS GOVERNMENT EXHIBIT NO. 10, FOR IDENTIFICATION.)

Q Go ahead with that picture?

A In this photograph it's—the cracks are more easily seen where the liquid run; just a close-up view, uh, more close-up view of that picture.

Q That is a closer up view of U. S. Exhibit No. 10—this is a closer up view, the same view of No. 10 Exhibit?

A Yes, sir.

MR. LONG: All right, sir; United States Eleven.

(WHEREUPON, A PHOTOGRAPH WAS MARKED

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BY THE COURT AS GOVERNMENT EXHIBIT NO. 11, FOR IDENTIFICATION.)

Q All right.

Testimony of Captain William A. Foushee

A Now, this photograph is a picture of the third floor and shows where the fire had burned through the roof and the roof fell down—what was left fell down into the third floor area.

MR. LONG: All right, sir; that is United States No. 12.

(WHEREUPON, A PHOTOGRAPH WAS MARKED BY THE COURT AS GOVERNMENT EXHIBIT NO. 12, FOR IDENTIFICATION.)

Q Go ahead.

A This shows the degree of burning on the second floor and that, uh, and the area it covered.

Q That is a picture of the second floor?

A Yes, sir.

MR. LONG: United States Exhibit No. 13, Your Honor.

(WHEREUPON, A PHOTOGRAPH WAS MARKED BY THE COURT AS GOVERNMENT EXHIBIT NO. 13, FOR IDENTIFICATION.)

Q All right. Now, Captain Foushee you

were coming up the stairs and got to the top of the stairs and walked up the charred steps, I think you said?

A Yes, sir.

Q Now, let's go from there; what did you do then?

A Well, we went—uh, there's an office in the northern section of this building and a large room, uh, a rather large room out, uh, south of the office. We went in there and, uh—

Q (Interrupting) Now, before you go away, tell the Court the condition of the Second floor at the time you got up there; who was present and what was going on?

A Well, firemen were present.

Q How many fireman; could you estimate?

A Well, there were a number of fireman up there. I don't know how many were there. Seventy-five fire fighters responded to, uh, the fire, which doesn't include all of the of-

ficers.

Q Well, let's say were there few or many men?

A Many.

Q On the Second floor; okay.

A They were in the midst of overhaul; what

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we call "overhaul". After the flames have been knocked down one of the biggest jobs is to overhaul the building, hit hot spots, open up the walls, uh, check any area where sparks could have fallen or, uh, and the reason they do this is to eliminate the possibility of a rekindle, and that's from, uh, if you don't put the fire out completely the first time, it will rekindle and, uh, burn again later on.

Q All right. Let me interrupt you now. You said you—I want you to explain to the Court what you mean by "flames knocked down". We are not firemen and I don't think any of us understand what you mean.

A Well, by the fire being—if the flames are knocked down, we would say it is under control. The fire is under control, but that doesn't mean that the fire is completely out.

Q How are they knocked down? Tell us what you mean.

A Well, by using the hose streams the fire has been reduced.

Q All right.

A Reduced, uh, to—it's been brought under control.

Q All right.

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A But that doesn't mean, as I say, that doesn't mean that the—uh, after the flames are knocked down the firemen can pick up the hose and go home.

Q Well now, let's get to the procedure; the fireman spray water from the outside into the inside of the building; is that right?

A From outside and inside.

Q They go inside with a hose?

A Yes, sir.

Q And if there is flame there, of course they can't go forward, can they?

A Not unless they can extinguish it as they go.

Q And they spray it with water?

A Yes, sir.

Q All right, sir; then after they spray the flame with water that's what you mean by knocking down the fire?

A After they get the fire down by spraying water on it.

Q Then what do they do?

A Then they go on into the building.

Q Into the building.

A And, uh, they begin their overhaul.

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Q Now, explain what you mean by overhaul. What are they doing by overhaul?

A Well, they are pulling ceilings down; they are opening walls; they are checking, uh—

Q (Interrupting) Is that when they are chopping everything up with their axes that people say the firemen do?

A Well, yes, sir; they do that; that's a part of it too. They, uh, would open any area where there might be sparks for instance, in this room, if I might make an example of a case of how careful they are to, uh, in their overhaul, normally—one case brings to my attention where we had a rather large home had burned rather severely.

MR. HADDAD: Now, let's object to any other fires.

Q Yes, let's—

MR. HADDAD: (Interrupting) It's complicated enough to keep it with this one.

BY THE COURT: I'll sustain that.

Q Explain what you mean by "overhaul"; those people, what would they do, say in this room, as an example for the

Court, after they knocked down, what would they do?

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A Well, they'd remove anything, or check any area where there could be a spark; the desk, the books, uh, if you had closets, any—they open up anything where there could be a spark.

Q All right; but on the second floor of the Gargotto building, what were the firemen doing when you got there on the second floor then?

A They were locating hot spots and overhauling the building.

Q All right. Now, what else did you see then; what did you do?

A Well, John and I were—as we were on the second floor, we noticed, uh, an area just south of the office, and I believe more or less more toward the ease side of it than the west, where some filing cabinets were and on the floor just north of the filing cabinets, uh, which the records were piled on the floor and some were scattered on the floor.

Q Well, what was on the floor; what was it on the floor?

A Records.

Q Well, what do you mean; papers?

A Papers.

Q Bundles?

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A Bundles of papers and so forth were on the floor.

Q All right.

A Well now, this could have been done by the hose streams, or how they could have been scattered, I don't know. I would judge probably the hose streams did it.

Q Hose streams; you mean streams of water; is that it?

A Streams of water in fighting the fire; yes, sir; yes, sir.

Q All right, sir. How many filing cabinets were there?

A I don't recall how many, but I'd say one or two at

least.

Q Now, were they opened or closed?

A Uh, these cabinet drawers were, uh, were open, uh, part of the way, yes.

Q All right, sir. Do you know who opened them?

A No, sir; I would assume that, again this would be something that the firemen would do in this overhaul; then open drawers and, uh, check this area for sparks to make sure that there would not be a rekindle.

Q And the rekindle—you mean so there

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would be no sparks?

A And they would leave and then be called back to extinguish the original fire again.

Q All right, sir; and what did you do then, you and Sgt. Aubrey?

A Sgt. Aubrey and I picked these records up off the floor and put them in a fire coat.

Q For what purpose?

A Uh, as I stated earlier, records many times will help show motive or help show motive for setting the fire and many times point directly to the person that is responsible.

Q Well, this was—you picked them up in conjunction with your arson investigation; is that correct?

A Yes, sir.

Q All right, sir; did you go into the filing cabinet?

A Yes, sir.

Q And what did you do there?

A We did remove, uh, some records from the filing cabinet.

Q All right, sir; do you know how many; few or many?

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A I would say few.

Q And why did you take them out of the filing cabinet?

A Well, the drawers were open and, uh, more or less, we picked records up off the floor. We picked some off the filing cabinet and, uh, we just put 'em in the fire coat.

Q Were these records in the filing cabinets in view?

A Yes, sir.

Q Now, the records that you picked up on the floor, were they near or around the filing cabinets?

A They was right near the filing cabinet.

Q And what did you do with them after you picked 'em up?

A After we picked 'em up, Sgt. Aubrey and I took them to Police Headquarters.

MR. HADDAD: Excuse me; are you talking about the records on the second and the third floor?

MR. LONG: No, not the third floor; we are not on the third floor yet.

Q What did you do with them? You put 'em in a fire coat, I believe?

A Yes, sir.

Q All right; then what did you do then?

A Well, we went to the third floor and I don't recall whether we went to the office or the third floor first, uh, which one is in sequence, but we did go to the third floor and we did remove a few records from the third floor; best I recall, they were lying on the floor.

Q And what did you do with those records?

A We put those in a fire coat.

Q What is the procedure for firemen regarding the papers and things that have been laying around?

A Well, after—during the overhaul, uh, many times, or most of the time they will station a fireman on the outside of the building. They will scoop up the debris which includes the records or anything else that's lying there and throw 'em

out into the side of the building or on the sidewalk or to the rear of the building and would have a man with a hose hoseing them down.

Q Now, would the firemen go into the cabinets and drawers and throw material in there out too?

A Uh, yes, sir.

Q And they—it is absolutely necessary to do that to make sure that the fire is, or has been extinguished? And had they done this at the time you got

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there?

A No, sir.

Q Well, did you beat them to that?

A Yes, sir.

Q Did you take those records off the third floor and where were they when you went on the third floor to find any records?

A They were—we did take some records off the third floor. The best I recall we took 'em off the floor. I don't remember any filing cabinets being up there.

Q All right, sir. Now, do you know what time the firemen left this fire?

A 1:21 P.M., March 22, 1969.

Q Do you know how many pieces of fire equipment were involved in this fire?

A Uh, fifteen pieces of equipment.

Q Do you know the time the third alarm was turned in?

A 8:29 A.M., March 22, 1969.

Q All right, sir. Captain Foushee, would you have had time to get a warrant to search this building?

A No, sir.

Q For what reason would you not?

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A Because by the time I would have went to get a

warrant and would have gotten back to the scene of the fire, the debris inside the building would have been scooped out the windows and would have been destroyed.

MR. HADDAD: Now, let me object to that answer and move to strike; move it be striken. Your Honor would not permit me to ask that question at the last trial that we had here on the basis, that the objection was sustained to it—on the basis that was his conclusion about whether he would have time would not be material.

MR. LONG: I believe Your Honor wouldn't let him ask that question because Your Honor had ruled in Chambers on—uh, already, on the suppression hearing.

BY THE COURT: Yes, and this is a Hearing for the Court of Appeals. I'm going to overrule the objection and let him answer.

MR. HADDAD: All right; then I'll be able to go into that thoroughly?

BY THE COURT: Yes, sir.

Q Now, I have forgotten where we were; uh, and would that have affected your arson investigation?

A Yes, sir; it would—it could have, if all of the evidence was destroyed; after it's once

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destroyed there's no getting it back.

Q And as I understand, in fact, you did arrest someone for arson in this case?

A Yes, sir; we did.

Q Did the records that you seized have any burn marks on them?

A Uh, some of them; yes, sir.

Q Or water marks on them?

A Yes, sir.

(AT THIS POINT A SHORT RECESS WAS TAKEN AFTER WHICH THE FOLLOWING PROCEEDINGS

OCCURRED:)

Q Captain Foushee, I show you a box of material that was introduced at the trial as U. S. Exhibits, and I don't know the number—it's not on here.

MR. HADDAD: He's talking about trial exhibits?

MR. LONG: The box was introduced; this is Exhibit 6 and this (indicating) is another exhibit. I don't know the number; it's not marked on there.

Q What does this box consist of?

MR. HADDAD: Let me ask a question on voir dire here; you have—they are not

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all of the records that were taken out of the fire?

MR. LONG: These are the ones that was introduced at trial.

MR. HADDAD: Yeah, but you had a lot more of them here that you permitted Schroering to take back with him other than these; these are not all of the records.

MR. LONG: We didn't introduce them.

MR. HADDAD: Are these the—uh, these are not—these are only part of the records that were taken from the fire, that part that you introduced.

MR. LONG: I don't know.

Q Were these some of the records that you seized at the time? Can you recognize them?

A Just by looking and identifying them that way, no.

Q All right, sir. Let me show you some of them and uh, just your observation, and let you see what they are. What—they have marks on them.

MR. HADDAD: May we ask what the purpose of this is, and might be able to stipulate

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as to it.

BY THE COURT: All right; what is the purpose?

MR. LONG: I want him to look at 'em and see if he can identify that they had some burn marks on them, Judge.

MR. HADDAD: Don't they speak for themselves?

THE COURT: I don't know whether we've got to cart 'em all the way up there again or not. Will you stipulate some of them have some burn marks on 'em?

MR. HADDAD: I don't even recall whether they did or not, Judge, if any of them had burn marks or——might be just smoke. Let him testify.

Q All right, Captain Foushee; I show you some of the records which are in this United States Exhibit which has been introduced at trial in a lump sum in a box. Look at this package here and you will observe some material on there. Would you tell me what that is?

A This is burn; there was some—this envelope is burned. There is, uh, some smoke, uh, heat and smoke probably caused this here (indicating), and other, uh,

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burned material. Several other—a number of pieces of burned material there.

Q This is just miscellaneous pieces of paper in a plastic bag there that you're examining; is that correct?

A That's right.

Q I show you a piece of, uh, paper—

MR. HADDAD: (Interrupting) George, are you representing that that was introduced at the trial as an exhibit?

MR. LONG: The whole thing was introduced in this box, Frank. We never went and pulled it all out. We introduced the safety tickets separately but not this box of material.

MR. HADDAD: All right.

Q This piece of paper, what has it got, uh, pink paper—got markings on it. What is that? What causes that?

A I would say that would be caused by the heat.

Q I show you a book and it says "journal", and examine

that and what does that markings on that, the dark markings there, what does that indicate to you?

A Heat, smoke.

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Q All right, sir; a package of paper wrapped with a rubber band, which undoubtedly is betting tickets, but, uh, this has got dark marks on it, and tell us what that is?

A Again, that would be caused by heat and smoke.

Q Here is a whole stack of papers marked "C" and numbers on it and yellow tabs on it and it has dark places on it; what causes that?

A Same as the other; it would be, uh, smoke and heat.

Q I show you some little manila envelopes, small type envelopes that have rubber bands around 'em and it's dark on there; what causes that?

A Heat and, uh, again, be heat and smoke would cause that.

Q Same thing on that one (indicating)?

A Yes, sir; there's water markings on this—uh, looks like water marks to me on this envelope here (indicating), besides the heat and smoke.

Q I show you another package, uh, just reaching in the box, I show you another group that's got some carbon in it and it looks like it's blue on there; what causes that blue?

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A Uh, water, uh, water apparently dropped down on it, uh, and caused it to run.

Q All right, sir.

MR. LONG: Your Honor; without going through all of them, most, or uh, a good many of them have marks on 'em.

MR. HADDAD: I would at this time, Your Honor, for the sake of clarity, so the matter, uh, so that the person reviewing this record will know just what we are talking about, uh, are the records being forwarded back up with the transcript?

BY THE COURT: We will forward those demonstrated to Captain Foushee, and just put 'em all, everything he discussed here in the plastic bag; give it to the Reporter.

MR. HADDAD: I think there is other things. You couldn't see him from your side of the desk, Judge. He was pulling other packages out of the box.

BY THE COURT: Well, I was just going to put it all in the plastic bag.

MR. HADDAD: Well, he probably ought to just either, uh, it would be easier to put the box up there because there's just all these things.

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BY THE COURT: All right; sent the whole box then.

MR. LONG: All right, sir. I believe that is all then. Well, wait.

Q Captain Foushee, the papers which you have examined in this box and the ones you've examined, you didn't examine them all there, uh, because there are so many, but the ones that had these marks on them, what would that indicate to you that, uh, had the burn marks on them?

A Well, it would indicate they was exposed to the heat, smoke and water.

Q And would that indicate to you that they were in your plain view when you arrived upstairs? Were these the ones that were on the floor?

MR. HADDAD: Well now, unless he knows—unless he could say whether they were on the floor or in the filing cabinet, now, they could be in the same condition in the filing cabinet if the drawers were opened.

BY THE COURT: Yes, unless—I think unless he can say that the condition would be different if they had been in the cabinet as opposed to having been on the floor—can you say that, Captain Foushee?

THE WITNESS: May I look

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at some of those again?

Q Sure, with the Court too.

MR. HADDAD: Well, first, I don't think he knows which came from which if I understand it correctly.

BY THE COURT: Well, I think that's correct. You can't say with definite certainty which came from which, can you?

THE WITNESS: No, but the only thing I can say, they were exposed and would lead you to believe these were outside the cabinet where they were exposed more to the heat and smoke and water than they would have been if they'd been, uh, filed inside a filing cabinet.

MR. HADDAD: Now, you're holding up two packages there, as I gather it?

THE WITNESS: That's—yes.

MR. HADDAD: Is that correct?

THE WITNESS: Yes.

MR. HADDAD: I understood his testimony earlier that some of the drawers of the filing cabinet were open.

THE WITNESS: Yes.

MR. HADDAD: All right; are

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you finished?

MR. LONG: Yes.

CROSS EXAMINATION

BY MR. HADDAD:

Q All right, Captain; as I understand the situation, when you got this call to come to that fire it was from a Captain Morgan who had put in the call to the office and they, in turn, called you?

A That's right.

Q And, by your own testimony, I gathered that you got there somewhere about ten minutes of nine, or five minutes of nine?

A Approximately that time; yes, sir.

Q All right; and some of these pictures that we have here, particularly those on the outside of the building, uh, specifically referring to Government Exhibit No. 1, and Government Exhibit Nos. 4, 5, 6, 7, 2 and 3, were all taken at about nine o'clock, is that correct?

A Yes, sir.

Q Then these other photographs were all taken that afternoon about 1:30 P.M.?

A No, sir; uh, they were taken, I believe it was April 11th.

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Q All right; on April 11th, they were taken about 1:30 P.M.?

A Yes, sir.

Q Those are the pictures of the inside of the building. Now, I believe Government Exhibit No. 8, which was a picture that was, uh, taken about 9:00 A.M., on that day, at least by what it indicates on the back of this—

A (Interrupting) That's when the photographer started taking the pictures.

Q All right. Now, there isn't any question about it, is there, that when you got there the fire had been extinguished? Now, just answer that question and if you want to explain it I'll let you explain it.

A Yes.

Q Is that right?

A Yes, sir; but I'd like to qualify my answer.

Q Now, you have testified—

MR. LONG: (Interrupting) Let him qualify his answer.

Q I'm going to get—you can qualify it all you want to in just a minute. You have testified here before, and referring specifically to page 79 of the

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Transcript of Evidence of this case, Volume II, I believe—no, correct that; Volume I:

"The fire had been extinguished, but the fire equipment was still present, and according to the information I received there was direct evidence that the fire was set."

And, again, on cross examination, you testified that:

"As I understand from what you testified here, by the time you got there the fire had already been extinguished?"

"Answer—That's right."

"Is that correct?"

"Yes, sir."

And, again on page 94, on cross examination, and on pgae 95:

"All right; I want to be certain now, you have said that the fire had already been extinguished when you got there?"

"Answer—

"And this is the information that Morgan gave you?"

"Answer—That's right."

You made those answers at the trial of this case did you not?

A Yes, sir.

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Q All right. Now, you testified earlier here that when a fire was knocked down, uh, your testimony—when you said a fire was knocked down that the fire was under control?

A Yes, sir.

Q All right; and this fire was under control when you got there, was it not?

A Yes, sir; when I got there it was under control.

Q All right. Now, there was no other arson men when you arrived?

A That's right.

Q All right. Now, who took charge of the investigation from that moment on when you arrived there and reported to

Captain Morgan that you were there?

A I did.

Q So, you were in complete charge of any investigation?

A That's right; that's right.

Q And under the rules of the Fire Department, any order that you gave there would have had to have been followed with reference to that investigation, would it not?

A I can't go so far as to say any order.

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It depends on—

Q (Interrupting) I'm talking about with reference to preserving testimony in the arson.

A Uh, naturally, they would have tried to preserve any evidence, Mr. Haddad, but, uh, I, as Arson Investigator, with the Chief of the Department, and other ranking officers there, uh—

Q Was the Chief there at this time?

A Uh, I—right now I don't recall seeing him there.

Q All right. Well, as far as we know, Captain Morgan was in charge and I want you to take the situation as it existed.

A There's, uh, two other officers outranked him who were there.

Q All right; so who—did you talk to any of them?

A Uh, I'm sure I did, but I don't—

Q All right; they knew you were there then, I take it?

A Yes, sir.

Q All right. Now, the fire was extinguished and the premises were secured by the Fire Department were they not?

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A Right.

Q And the Police Department was also present there, were they not?

A Sgt.—uh, Detective Aubrey was there.

Q Any other police there?

A Not inside the building.

Q All right. Now, no other people were permitted inside that building at that time and after the building had been secured except either a police officer, and in this instance, Sgt. Aubrey, or firemen were permitted to enter the building?

A I don't know if anyone ever asked to come in.

Q All right; I didn't ask you that.Now, Captain, I'm going to ask you to answer my question and let's get it straight. On page 95 of your previous testimony the question was asked:

"All right. Now, the premises were secured, I take it, by the Fire Department and the Police Department present, were they not?"

And your answer:

"That is true; yes, sir."

"Question—No one other than officials,

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such as police or firemen were permitted to enter the building, were they?"

"That's true."

Was that your answer?

A Yes, sir.

Q Now, you gave those answers to questions at that time, did you not?

A Yes, sir.

Q Sir?

A Yes, sir.

Q All right. So, you entered the building and, as I recall, you saw what you believed to be accelerant that had been placed on the steps leading to the second floor and on the landing of the second floor?

A Yes, sir.

Q How many rooms were there on the second floor? I'm

not speaking of the landing out there. I'm speaking of rooms that were partitioned off on the second floor?

A Best I recall there was two. There was one in the office at the northern section of the building and a large room at the south of the office.

Q All right; the northern section; you mean the one facing Jefferson Street?

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A Yes, sir.

Q All right. Now, as you get to the top of the steps I take it that the north room is the first room that you go into because the steps come up from Jefferson Street?

A No, it isn't. You, uh, there's a door that leads in the large room just to the right of the stairway and, uh, you can enter the large room that way or you can turn to your immediate right, uh, to a door that leads into the office section.

Q You come up the steps; they are the steps that lead off the Jefferson Street side?

A Yes, sir.

Q All right; So, when you get to the top of the steps the first room to your right would be the room you call the north room; is that right?

A No, there would be a door—there would be a doorway, uh, there was an enclosure there and there would be a doorway, one doorway leading to the large room; uh, another door, north of the stairway would be the one to enter the office.

Q I see; is that depicted in Government Exhibit No. 9?

A This shows the doorway leading to the

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office. There is another photograph that shows at the top of the stairway is the doors that lead into the large room.

Q All right. So, Government Exhibit No. 9, the door to the left of that photograph is the one that enters the office.

right?

A Yes, sir.

Q And Government Exhibit No. 10, is the landing on the second floor and shows the steps coming up to it and the door on the right leading to the big room, or the south room; is that correct?

A Yes, sir.

Q Okay; now, it is true, is it not, that there was no accelerant whatsoever in either the north room or the south room?

A We discovered none whatsoever.

Q All right. It is also true that there was no accelerant on any of the items, filing cabinets, equipment, desk or anything else in either of those two rooms, was there? There was no accelerant on anything in either of those two rooms?

A No, sir.

Q And particularly, no accelerant on any of the records or the papers?

A No, sir.

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Q Now, you gathered up records from the North room?

A We gathered most of the records from the large room south of the office.

Q All right. Did you gather any records in the north room?

A In the office?

Q Yeah.

A Which would be the north room; we did remove some records.

Q All right; now, those records were removed from a desk?

A Uh, yes, sir.

Q All right. The drawers of the desk had to be opened?

A The drawers to the desk, to the best of my knowledge,

were closed and we opened 'em.

Q All right; you opened 'em. Now, those records were put into the fireman's coat and then do you recall whether you went into that room first, or you went into the south room first?

A Best I recall, we went into the south room first.

Q All right; so in any event, when you

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went into the south room you found that there was no accelerant anywhere in the south room on any of the records or any of the fixtures or furniture?

A No, sir.

Q All right. You gathered records from the south room from filing cabinets and from the floor?

A Yes, sir.

Q Is that correct?

A Yes, sir.

Q Some of the drawers on the filing cabinets were open?

A Yes, sir.

Q Some of the drawers on the filing cabinet were closed?

A I said they were open.

Q I say were some of them closed?

A No, they were open.

Q How many file drawers were there, or file cabinets were there?

A I'm not—I don't recall how many cabinets there were; I'm guessing at one; maybe two.

Q You don't have any pictures of—

A (Interrupting) No, sir.

Q (Continuing)—of any of the equipment

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in the south or the north room?

A We had some other pictures that were taken, but not—we didn't have any pictures, but some of the

photographs which were taken, uh, due to the water—we used a Price Camera and the water, leaking down on the negatives, ruined those negatives.

Q So you don't have 'em?

A No, sir.

Q All right. Now, the records that you got in the south room were put into the fire coat. Those from the floor, or those from the filing cabinet; you then went to the north room and the records that you found in the desk drawers in the north room, or the office, were also comingled and put into the fireman's coat; is that correct?

A Yes, sir.

Q All right. Then from that point I take it that you all searched the big, open room on the third floor, or you went up there and went into it?

A We were up there and went—uh, whether that's the right sequence or not, I don't know.

Q All right.

A But I do know we went up there.

Q In any event, whether the sequence is

correct or not, so that there will be clarity here, there was no accelerant at all on the third floor room, was there?

A No, sir.

Q There was no accelerant on any of the fixtures or furniture in the third floor?

A No, sir.

Q And you gathered up whatever records that you found up there and you believe those records, most of them, were on the floor and comingled those with the other records and put them in the fire coat?

A Yes, sir.

Q And there was no way for you or anyone else to know which records came from which room is there?

A Not from—not for me to tell which came from the room.

Q All right. They were all mixed together. Now, after you mixed 'em together how did they get out of that building?

A Sgt. Aubrey and I carred them downstairs, put 'em in his car and took 'em to Police Headquarters, and he has a small office. We took 'em inside the office.

Q You locked them up in there?

A And locked 'em up in there.

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Q All right. Now, getting back to the time that you were in the building there, you stated that you didn't have time to go get a search warrant?

A No, sir.

Q Now, the fire was under control; it had been extinguished; the premises were secure. Couldn't you have ordered the people in command there, as an arson investigator, to maintain the status-quo of these records so that, "I can go get a search warrant"?

A I don't believe I would have had the authority; the amount of time is what was important.

Q You have had that authority, uh, could have had that authority?

A I would have—I could have requested it.

Q All right; but—

A (Interrupting) But I don't think there would have been time because of the amount of time it would have taken.

Q How do you know how long it would have taken? It was nine o'clock on a Saturday morning, or shortly after, or, was it Saturday or Friday?

A It was Saturday.

Q Uh huh.

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A Now, I was there alone, except, as I said, I got John

Aubrey to assist. By letting the firemen go on with their overhaul, as I did, they didn't leave until 1:20 P.M., and we could not tie up all this equipment for hours upon hours to go get a search warrant.

Q Well, what do you mean about tying up any equipment; you talking about keeping the status-quo there?

A Because the equipment would have had to have stayed there. They would have had to have gone on with their overhaul in extinguishing the hot spots. I didn't have anyone in my outfit who I could station there at the records and, really, I don't think I would have had the authority to demand that the fire department just stop operations completely to hold onto those records while I went to get a search warrant.

Q Do you or do you not have the authority when you are investigating a fire to tell them to maintain the status-quo until you could complete the arson investigation? Do you have that authority as a Captain?

A I can request it.

Q Well, I could request it if I happened to be on the scene, but I mean as far as the rules and regulations of the fire department are concerned, what is

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the order of command as far as who is, uh, in charge and who can tell who what to do in a situation?

A I was in charge of the investigation, but the Chief of the Department is in charge of the fire righting section and all these men who I'd been talking to outrank me and if I went to a Battalion Chief, which was a Major, or a Lieutenant Colonel, I have to request it.

Q Would that request ordinarily be honored?

A If it could be done, it would be, yes.

Q All right. Now, you are not contending that at the time you went into this building that these records were evidence of arson, are you? You didn't know what the records

wou!d show at that point.

A That's right.

Q As far as the evidence of arson, you saw that in the accelerant that had been placed out there on the steps and on the landing?

A That's right.

Q Now, in gathering these records up, you had hopes that by examining those records later that you could find whether or not there was a motive for somebody setting the arson; is that correct?

A Yes, sir.

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Q All right. Now, you could not tell by looking at these records as you saw them there in the south room and as you saw them there in the north room and as you saw them there on the third floor room, you could not tell that these records would reveal anything?

A That's right.

Q And you could not tell that these records would be evidence against the accused in any manner?

A That's right.

Q All right. Now, Mr. Gargotto, and for this Record, was never charged with this arson, was he?

A No, sir.

Q And some four hours after the alarm was sounded for this fire you made an arrest of a man by the name of Hooper?

A Yes, sir.

Q And I believe you have testified heretofore from the moment that you arrested Hooper you knew that it wouldn't become necessary for you to look at those records to see any motive for fire and, in fact, you never did look at 'em and examine 'em, did you, after that?

A No, sir.

Q All right. Now, after you arrested Hooper some four

hours later and I take it that you did make

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that arrest?

A Yes, sir.

Q Did you make any effort to return these records to Mr. Gargotto?

A No, sir; I did not.

Q All right. You saw Mr. Gargotto there at the scene of the fire the morning after you had arrived there, or he arrived some time after you did, one way or the other?

A Yes.

Q And you knew these premises belonged to him?

A Yes, sir.

Q All right. Now, Mr. Gargotto, some time within four or five days after that called you and asked you if you had his records that he wanted to see 'em or wanted 'em back?

A He didn't—he didn't say he wanted 'em back.

Q Well, what was he calling you about?

A He, uh, stated that he had heard I had some of his records.

Q All right; what did you tell him?

A I told him I did have, but I had turned

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them over to the Commonwealth's Attorney.

Q What did you think he was asking you if you had his records for; just to see if you had 'em, or to ask you for them back?

A I don't know, but I didn't—uh, he didn't ask for 'em back.

Q You didn't have 'em to give back, did you?

A No, sir.

Q So, it was not immediately apparent to you that these records were any type of incriminating evidence, was it?

A No, sir.

Q But between you and Sgt. Aubrey, you took every piece of paper on the second and third floors of this building in, and comingled 'em together, did you not?

A We didn't take all of the papers up there. We—the ones we took we put together.

Q Well, what papers did you not take?

A I don't know. We went through 'em rather fast. We didn't take everything, uh, of all the papers on the floor.

Q You left very few of them there though, didn't you?

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A Uh, there's probably—I don't recall, but I know we didn't take everything that was on that second floor.

Q Neither you nor Aubrey took time to examine these records; is that what you have testified to?

A That's right.

Q And when you turned the records over to, uh, Commonwealth Attorney Schroering they were still comingled together, were they not?

A As far as I know they were in, uh, a cardboard box.

Q And at no time did you ever show the records to Mr. Gargotto?

A Uh, no, sir.

Q Normally, would you have taken records from a fire directly to the Police Headquarters, or would you have taken 'em to your headquarters and stored them there?

A Normally we would have taken 'em to our evidence room but our evidence room has been moved to a location deep into the West End and they—uh, the reason we took 'em to Police Headquarters was because I was in a rush to get back to the scene and I asked John Aubrey if we could take 'em there and lock 'em up. So, I—it was close

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and I could get back to the fire scene.

Q Did you remove, at that time when you had Aubrey

with you, any other evidence there, or any evidence of arson such as any pieces of charred wood, or anything like that?

A No, sir.

Q Any of it that might indicate that an accelerant had been used?

A No.

MR. HADDAD: All right.

REDIRECT EXAMINATION

BY MR. LONG:

Q Captain Foushee; you have used the word "extinguished". The fire was extinguished, and Mr. Haddad didn't let you explain about it. Would you explain to the Court what you meant by extinguished?

MR. HADDAD: I think he testified on direct what you wanted him to say about that.

BY THE COURT: I'm going to let him answer it; go ahead.

A Uh, I said extinguished. As I stated earlier, that doesn't mean, when I say extinguished a fire, that the Fire Department can pick up their equipment and

leave. In this case, or most cases, the Fire Department involved—uh, it means that the fire has been brought under control; it doesn't mean that there still isn't hot spots that has got to be hit and extinguished by firemen. Some of it might be inside walls that's not visible from the outside.

We've got to take care that and tear all this out. So, therefore, really, completely to extinguish the fire doesn't mean that. It means it was under control.

Q Now, you said the building was secure; what do you mean by that?

A Well, fireman—the first firemen were in the building and the police were there and some of them were directing traffic somewhere around the building.

It had to do with—they just wouldn't let every—anybody in that wanted in the building—wouldn't let them in.

Q You mean they were keeping the public out?

A The public.

Q All right. Now, you mentioned earlier that you took some other pictures but the water leaked on the negatives.

A Yes, sir.

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Q Right?

A That's right.

Q Was the water leaking down from the third floor above while you were there?

A Yes, sir; there was; that's why we, uh, we had fire coats on.

Q You were dressed in a fire coat?

A Yes, sir.

Q And was water leaking on you

A Yes, sir.

Q Now, if you had left that scene to go get a search warrant, you couldn't have ordered the water to stop leaking down too, could you?

A No, sir.

Q And you couldn't have left the orders there for the water to stop?

A No, no one—no way.

Q And if the water had been leaking down would it have been leaking on these records laying on the floor or in the cabinets?

A Yes, sir.

Q Now, I show you Defendant's Exhibit No. 13; uh, that shows the debris on the floor and the bare walls. Did the firemen do—rip those holes, uh rip those

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walls out that way?

A Uh, in this area here (indicating)?

Q And that—

A It was burned away. There was cover here (indicating), but you can see, uh, but it's burned away. Now, if this had been a solid wall they would have opened it up to make sure, absolutely certain there was no fire in that—in between the walls.

Q All right, sir; and this—is this a cabinet there (indicating)?

A It's a machine, vending machine, uh soft drink machine.

Q And that door has been opened, hadn't it?

A Yes, sir; uh, I don't know. Uh, I really have no idea who opened that door.

Q Well, would the firemen normally open up all doors and drawers?

A Well, in a soft drink machine, uh, it's doubtful. They may have; I don't recall, but many times businesses will leave these machines open to keep people from breaking into them.

Q All right, sir. Now, if you had left this scene as suggested in your cross examination and gone

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to get a search warrant, you could not have stopped a rekindling of the fire while you were gone, could you, by leaving orders?

A No, sir.

Q And is there danger, as I understand it, of rekindling; is that what firemen are doing going through the building?

A Yes, sir; that's why they overhaul; that's one of the main reasons they overhaul the building, to make sure that there's not a possibility of a rekindling.

MR. LONG: I believe that's all, Your Honor please.

RECROSS EXAMINATION

BY MR. HADDAD:

Q Were there many firemen present overhauling the building; uh, the purpose of it is to keep it from rekindling, is it not?

A That's right.

MR. HADDAD: That's all.

MR. LONG: Sgt. Aubrey.

* * * * *

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SGT. JOHN AUBREY, called as a witness, by the Plaintiff, having been first duly sworn, was examined and testified as follows, to-wit:

DIRECT EXAMINATION

BY MR. LONG:

Q State your name to the Court, please?

A Sgt. John Aubrey.

Q And where do you live?

A 1206 Allison Avenue, Louisville, Kentucky.

Q And what is your occupation?

A Uh, Sergeant on the Louisville Police Department.

Q How long have you been so employed?

A Eleven years and some odd months.

Q And what are your duties with the Louisville Police Department?

A I'm Platoon Sergeant in the Narcotics Squad.

Q And what have been your duties prior to this time?

A Prior to this assignment I was Communications Sergeant for one year and prior to that I was in charge of Intelligence for a period of time and prior to that

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I was a Detective and for the first five years I was a Motorcycle Officer.

MR. HADDAD: It's all in the Record, George, before.

MR. LONG: All right.

Q Turning your attention then, Sergeant to March 22.

1969, did you have occasion to be on Jefferson Street at a fire?

A Yes, sir.

Q And, uh, what did you do at that time? Tell the Court what you were doing there and what occurred and what you did?

A Well, on my way to work that morning I passed 238 West Jefferson, uh, where a fire was in progress. I went to work and I came back to the scene a few minutes later and, uh, met Lieutenant—uh, at the time, Lt. Foushee of the Arson Squad, who was standing out front. He asked me if I would, uh, help him.

He was investigating suspected arson of the building. He obtained for me a fireman's coat and hat and took me into the building where, at different points in the building, he pointed out items that he wanted to seize as evidence in this arson investigation.

Q What kind of coat was this he gave you?

A Well, I had a fireman's coat that I wore and we had a second fireman's coat that we later put, uh, items in that he had pointed out.

Q What is the purpose of wearing a fireman's coat, if you know?

A At this particular time the firemen were still in the building, uh, fighting this fire with hoses and, uh, I had on a business suit and, uh, it was to keep me from getting wet—getting my clothes dirty.

Q Was there water dripping down inside; is that what you mean?

A Yes, the firemen were still in the building when we went in and they had their hoses and axes and, uh, they were still extinguishing the hot spots in the building and taking their axes and taking the walls down and things like that.

Q All right, Sergeant. When you went into the building

with Captain Foushee where did you go? Tell the Court what you did and proceed from the front entrance or what entrance you went in.

A Well, the exact route, I can't recall at this time. We ended up—we went in the front of the building on the Jefferson Street side and there were some stairs, I believe that led up to the second floor, uh, the

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second floor, which had one real large room and, uh, toward the front was a smaller office type room.

Especially on this second floor there was all kind of clutter and debris. Lt. Foushee would point out different things that he wanted seized, uh, records, uh, and things like that and we would—I was collecting 'em—helped him collect and we was putting 'em in the fire coat and I was more or less following him around doing what his directions were.

Q And where were these things that he was directing you to pick up in these proceedings?

A Well, the majority of them, of the records came from, uh, this large room. There was a large counter-like affair on the east wall of the second—of this room. It had drawers in it. These drawers contained, uh, mostly blank pads, long pad-type affairs; uh, the records that we were seizing that were out on the floor and near these—uh, near some sort of cabinet in there, uh, appeared at the time to be some type of gambling records and, uh, of course later on, uh, verified the facts that these were, uh, rundown sheets, and the small brown envelopes that they keep track of what each guy has bet, what he owes, et cetera.

Q Small brown envelopes; where were they?

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Do remember where they were?

A No, sir; not specifically. Uh, most of these records that we were seizing out in the open were wet and would probably

still have water marks on 'em. A lot of 'em were scorched, or charred—the ones that were—

Q And were these laying around the floor, or on top of cabinets or in cabinets, or—

A They were; things were scattered all over the place where—of course, the firemen had been in there and were still in there looking for hot spots and things like that. As far as, uh, specifically which part of the room they were in, I don't recall, but most of the records that we took, uh, later on, you could tell they had scorch marks on 'em and water marks with the water from the fire hoses that had, uh, gotten on 'em.

Q What was the scene on this second floor? Describe the scene to the Court; were there firemen on the second floor when you went upstairs?

A Well, this is the first time that I had been into a building that was on fire while the firemen were still in there fighting the fire, and there was a number of firemen still in there.

Q Would you say few or many firemen?

A A number. I don't have—I was staying

real close to Lt. Foushee and where he said go, I went, and most of my time was occupied with picking up what he said to pick up.

Q Well, what did the firemen have with them?

A Well, they were still throwing water on the walls and on the ceiling and they had fire axes where they was taking down the walls to see if there was fire in behind 'em. They were running up and down the steps; there was firemen up on the third floor and they were getting, uh, in the process to start, uh, throwing the stuff out the windows, you know. They throw it out, and some guy was downstairs with another fire hose and he was putting more water on it.

Q And did you take anything out of the cabinets?

A Well, there was a number—best I can recall, there was a number of cabinets in this building; in the offices, one cabinet that had, I believe, had a lot of clothes or something in it. Apparently, you know, a guy was keeping his stuff in there.

I don't recall any records coming out of there. There was a desk in this office—this office that fronted on Jefferson Street and it had things in it like, uh,

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oh, monthly telephone bills. It seemed to have some sort of ledger sheet for, uh, this theater business that was downstairs; you know, just general stuff that was in the desk. A lot of that stuff was picked up and put in this raincoat. Most of the things that appeared, uh, to be, uh, rundown sheets, or those brown envelopes, came from this large room where this counter-like, or bar-like thing was and I—I don't believe they were in any cabinet because they were wet and they had scorch marks on them; things like that.

Q Were these cabinet drawers open or closed at the time you were there?

A Well, there again, some of 'em, uh, it was apparent that, uh, the firemen when they went in there, and were still in there, they had opened 'em—were in the process of opening 'em. They were looking for sparks and for, uh, fire that, you know, wouldn't be apparent without looking into 'em. Things were just in a general clutter.

Q Were you and Captain Foushee moving through this area leisurely or were you in a hurry?

A Well, it seems to me like we wasn't going fast enough, but I'm sure that he knew what he was doing. So, I was just doing what he told me, you know, about moving and about picking up things, et cetera.

Q And what did you do with all this

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material that you picked up?

A Well, I was carrying this large—this second raincoat that he gave me and we was placing it in there and wrapping it up and, you know, we was moving around through the building that way.

Q And what did you do then?

A After we collected everything that he wanted?

Q Yes, sir.

A I took it downstairs and we both went to Police headquarters and, uh, at Seventh and Jefferson Streets and put it in my office which at the time was on the second floor, the Intelligence Office. We glanced at what we had and then Lt. Foushee went back. I think he went back to the fire scene and I had some other things to do.

Q I show you some—

BY THE COURT: Gentlemen, would it suit you to take about a ten minute break before we go on to something else?

MR. LONG: No, sir; I'm just going to show him this one thing, Judge.

BY THE COURT: Oh, all right.

Q I show you some yellow envelopes with a

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rubber band around 'em and they have some dark marks on the top. Are those similar to the envelopes that you were talking about that you picked up?

A Yes, sir.

MR. LONG: I believe that is all.

BY THE COURT: Let's take about ten minutes.

(WHEREUPON, AT ABOUT THE HOUR OF 3:30 P.M., A RECESS WAS TAKEN TO ABOUT THE HOUR OF 3:40 P.M., WHEREUPON THE FOLLOWING PROCEEDINGS OCCURRED:)

CROSS EXAMINATION

BY MR. HADDAD:

Q All right, Sergeant; you recall what time it was when you arrived there at the fire?

A Some time between 8:30 and 9:30 A.M., in the morning.

Q Is that when you passed there, or when you came back?

A No, I had to be at work at 8:30, so it was some time –

Q After that?

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A After that I went down.

Q And it would have been after Captain Foushee arrived at the scene then?

A Well, I didn't see him when I went down Jefferson. When I came back he was standing in front of the place.

Q All right. Now, when you had gotten there the firemen were still there and they had knocked the fire out, but they were still inside the building at the time, uh, looking for the hot spots?

A Well, they were still inside with their hoses running with axes, taking the walls down, but the fire had been knocked out. As far as actually a lot of flames there, I didn't see any of them, you know. You could see the wood smouldering and steaming, whatever it was doing.

Q All right. You testified earlier at page 115 at the trial of this case that the firemen were still there and they had the fire knocked out, but they were still in there with the hoses and that is correct, is it not?

A Yes, sir.

Q All right. The premises were, uh, were in control of the Fire Department at that time?

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A Yes, sir.

Q Now, as I gather it, you went with Captain Foushee

and you were carrying the fire coat when you went up there that you ultimately put all of the records in that were taken from the north room and the south room of the second floor and the records that were taken from the third floor; is that correct?

A Everything that we picked up ended up in that fire coat.

Q All right. At the time, now, that you and Captain Foushee were going through there you were following what instructions that he gave you?

A Right, yes.

Q From what I gather?

A That's correct, sir.

Q And all of these records that were put in that fire coat were ultimately comingled and put down in the room down there at Police Headquarters?

A That is correct.

Q And as you were going through the building there with Captain Foushee you could see some of these records were on the floor; it was obvious to you that some of the stuff that was on the floor had been in the file cabinet and the firemen had thrown it out; you testified

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to that a minute ago; is that correct?

A Well, I don't know where it came from. When I saw it, it was on the floor.

Q All right. Even though you saw the stuff there on the floor and the stuff that you did see there in the file drawers and the stuff that you did see there in the desk drawers, uh, even though you saw those materials, those records, those papers, those different items, you did not know at that time that they were evidence of any crime, did you?

A Foushee had told me that he was seizing this stuff because that, uh, arson was involved in the fire. As far as, you

know, me knowing that that was evidence of arson or not, I was just—I didn't know that.

Q All right; and it wasn't evidence of any contraband, in other words. You know what I mean by contraband?

A Uh, I believe so.

Q All right; what do you mean by contraband?

A Uh, something that could be used to show that a crime had been committed.

Q No, no; contraband is something that the possession of it alone is illegal, such as untax paid

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whiskey.

A Okay.

Q Moonshine.

A Right.

Q Or something of that type. This was not contraband that you saw there; any of the records that you saw?

A Well, I believe that in my earlier testimony that some of that stuff appeared to be gambling records.

Q I understand that.

A But, you know, I didn't know for sure at the time because we weren't standing there looking at it.

Q Uh huh; but in any event, none of it appeared to you to be contraband, as such, from just being—looking at it; is that correct?

A Well, I—under your definition of it, I believe possession of gambling paraphernalia, would that be contraband under state statute?

Q Oh, no, no. You couldn't tell what it was; you thought that some of them were gambling records?

A Some of 'em appeared to be.

Q That is the extent of it; is that correct?

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A Yes.

Q You didn't see anything that you thought was stolen property at that time?

A No, sir.

Q And, uh, you were made aware that Captain Foushee had made an arrest some time early that afternoon of a Mr. Hooper and charged him with arson of the fire?

A I don't recall when I learned that because we separated after we dropped that stuff off at my office. I honestly don't recall when I did learn that Hooper had been arrested.

Q Now, even after you had gotten the records to your office and at, uh, had had an opportunity to look at 'em, you still couldn't tell whether any crime had been committed?

A Other than the fact that they were apparently gambling records; that's—

Q Yeah; you couldn't tell whether any federal offense had been committed either, could you?

A I couldn't, no.

Q All right; so that the records will be clear here, you did not place any charges against Mr. Gargotto; any criminal charges?

A No, sir.

A No, sir.

Q And to your knowledge no state crime, uh, no state criminal charges have been made or placed against Mr. Gargotto as a result of the records of this case?

A Not to my knowledge they weren't, or haven't been.

MR. HADDAD: That's all.

BY THE COURT: All right.

MR. HADDAD: Call Mr. Coots.

* * * * *

AGENT FRANK COOTS, called as a witness, by the Defendant, having been first duly sworn, was examined and

testified as follows, to-wit:

DIRECT EXAMINATION

BY MR. HADDAD:

Q Mr. Coots, very briefly, you were called on Sunday, the record indicates here, by Sgt. Aubrey and told that he had these records that had been taken out of the Gargotto building and you and Mr. Brucher, another Special Agent from the Internal Revenue Division appeared over at his office on the 24th or 25th, I believe?

A I believe we went over to his office on

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Monday. I got the call on Sunday at my home.

Q Would that be the 25th?

A I think I went over the next morning.

MR. LONG: If Your Honor please; we object to this; this has been gone over in the trial.

MR. HADDAD: I'm not—bear with me for just a second.

MR. LONG: This isn't what the case was sent back for.

BY THE COURT: All right.

Q When you first saw these records in Sgt. Aubrey's office, or in the office in which he had these records and you examined these records there and made photo copies of 'em, it still was not immediately apparent to you that any Federal offense had been committed was it?

A No, it wasn't determined that a Federal offense had been committed until after investigation was completed. I couldn't determine it by examining records.

Q That's what I'm trying to ask you; you could not determine it by examining those records?

A Not at that point.

Q And it wasn't until you completed further investigation and checked returns filed and every-

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thing else some time later?

A I didn't make the investigation; I just copied records there.

MR. HADDAD: All right; you answered my question; thank you. That's all.

MR. LONG: I have no questions

MR. HADDAD: That's the case.

BY THE COURT: All right; gentlemen, you want five minutes to espouse your case?

MR. LONG: All right, sir.

MR. HADDAD: Judge, let me think; have we gotton to both of those issues that the Sixth Circuit's opinion sort of—

MR. LONG: I don't think—now, we haven't gotten to the Judge's second point in the Judge's order. Now, the Judge said if he makes a ruling one way then we have to go into the segregation business. We haven't gotten to that yet.

BY THE COURT: Well, that may be technically true. We haven't gotten into it and I don't know what proof you would have that would show them to be segregated, or segregatible though I notice Captain Foushee

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says he doesn't see how it could be done.

MR. LONG: Well, I have a witness who, if that becomes necessary, I have a witness who says they go through them and segregate them.

BY THE COURT: As to whether they came off the floor or out of cabinets?

MR. LONG: No, what the charges were made from, and by the burn marks on there, we can show which ones were used in the interpretation to prepare the indictment.

MR. HADDAD: I think that is what the Judge said prior to the hearing we weren't going to get into.

BY THE COURT: That's right. Well then, to make it clearly understood, we are just dealing up to this point with whether or not the exigencies of the situation justified the

search being extended to the drawers of the desk and cabinet and the seizure of the contents without a warrant.

MR. LONG: Yes, sir.

MR. HADDAD: Judge, I think that we've got a situation here where the testimony at the trial of this case and the testimony that you have heard here is substantially the same. When Captain Foushee

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arrived there the fire had been extinguished, and at today's hearing he, although he's testified to that four times in his other trial, he's testified to it several times here—today he explains what he means by extinguish is that the flames and all had been out, but that the firemen were still on the scene and that the firemen were still checking for hot spots.

I don't think that changes the situation one iota from the fact that the fire was out. Now, in its opinion, the Sixth Circuit gets into this "plain view" situation.

Now, none of these records here that—in order to come within the "plain view" it's got to be immediately apparent that the records were evidence of some crime for them to be able to take them and they be admissible under the "Plain View Doctrine".

Both of the witnesses here have testified that it was not immediately apparent to them that these records were evidence of any crime. Captain Foushee, in further clarifying his testimony, today said that, uh, as far as the records were concerned, there were no evidence of any accelerant on the records. There was no evidence of any accelerant in the rooms where the records were found and taken from. He testified that records were taken from

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drawers of file cabinets, from drawers of desk—from drawers of the desk and from the floor.

Sgt. Aubrey testified on direct examination that when he

got there it was apparent that some of the stuff from the file drawers had been taken out and strewed on the floor by the firemen.

In any event, there was no emergency circumstances there that would permit them, or that should have permitted them to have grabbed these records off the floor. First of all, they weren't evidence immediately evident to them that they were contraband or immediately evident to them that they were evidence of intent of any crime.

The Fire Department had the place--the building secure; the testimony is uncontradicted. The Police were on the scene according to Captain Foushee's testimony. No one was permitted in and out of the building except Police and Firemen.

The situation could have been well secured if they had had probable cause to have obtained the search warrant, but I submit to Your Honor that as of that point the probable cause that they may have had to search for evidence of arson may not have been—uh, may not have even reached these records with a search warrant, that were

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there because he said that there was no accelerant on them, uh, that there was no accelerant in the rooms where these records were, and there was no further danger of those records being burned with the firemen on the scene, as he calls it, having the fire under control.

It was—the purpose for them being there is to keep the fire from being rekindled. He would have had ample opportunity and the firemen were there until after one o'clock that same afternoon.

Now, I think a further point that is interesting here that, uh, these records were not, uh, turned over to the Bureau until the following Monday, and it became evident, according to Foushee's testimony that as of four hours after the fire when

an arrest was made of Hooper, that these records were no longer, uh, suspect, or these records were no longer even needed by him and he didn't even look at 'em any further to determine whether they could form or prove a motive for the crime.

Now, had these records contained any evidence of accelerant on them; had these records contained or been in the room where any of the accelerant was around it, they may well have been evidence of the arson, but they couldn't have been motive for the arson and as such, they would not be evidence that would be immediately apparent to them as

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incriminating to Tony and they both testify to that so I don't thank that the meaning of the situation or the exigency of the situation here, uh, would permit a search of this magnitude.

Now, to come across something inadvertently is your "plain view" situation, but here, to purposely go through each of three rooms or the two rooms on the second floor and direct records to be gathered up and comingled and put into a fire coat, go to the third floor and do the same thing, that's a far-reaching search and it doesn't come within the "plain view" doctrine under any circumstances here.

They made a total and complete search on the theory that this might later—suspiciously, in the mind of Foushee, he suspicioned that it might prove a motive for the arson; not that it might prove evidence of the arson, but might prove to be a motive for the arson.

So, I don't think that they had a right under the circumstances here to gather up any of these records. If they did have a right to do this, once they found out there was no arson apparent they should have returned them to the owner. The owner was there on the scene of the crime. He was well-known too; Mr. Foushee knew who the owner of the premises was and the records should have been

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immediately returned to him.

MR. LONG: If Your Honor please; the Sixth Circuit has ruled on that point, that the records which were in plain view were legally seized. We come down to a very narrow point and if I may quote one paragraph:

> "While it was immediately apparent to Lt. Foushee that the pattern on the floor might submit evidence of a motive for burning the building, was it reasonable to extend the search to the drawers for further evidence, or should the search have been broken off until a search warrant could be obtained? The answers to those questions depends upon understanding of the conditions existing at the time the officers were required to make a decision."

Now, Your Honor; the officers have testified that they were at this scene and there were fire hoses around there with firemen around; the stairs were charred; the firemen were chopping the walls down; water was still dribbling down.

Sgt. Aubrey testified water was still being sprayed around. The officers themselves were getting wet. They came in these rooms; they saw these papers scattered—scattered around on the floor.

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Captain Foushee, being an arson investigator, said, "Seize those records." The filing cabinets were open. We are talking about two filing cabinets and a desk. The filing cabinets, they both testified, were open, having been opened apparently by the firemen who were looking for hot spots.

They were in plain view; also, the drawers were open. They picked those up to get them out of there. The desk, Sgt. Aubrey testified, they may have went in while it may have been closed and Captain Foushee says it was and he said out of that desk came blank sheets of paper which would not have

been any incriminating evidence in this case, if that's true, in the first place.

So, these officers could not make a decision at this time to say, "Wait a minute; before we open those cabinets—first, let's go down to the courthouse and find a judge and get a search warrant." That would have been unthinkable; be unpractical, and to tell the Fireman in Charge. "Boys, don't bother that desk and don't bother those two filing cabinets 'till we come back and get a search warrant." It's just not the way things were done and that couldn't have been done in this case. If they'd left that there with the water dripping down all the time they may have ruined all the records and may have ruined the

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reports.

Captain Foushee may never have had an arson case, if he had one to begin with, if those were the records that showed it. The records may have been ruined by the water dripping in, if nothing else.

Also, in case of a rekindling while they were gone the fireman couldn't wait until—can't tell the fire. "You can't rekindle 'till they get a search warrant back here." They would have had to go ahead and destroy the evidence.

Now, also, Captain Foushee, if he had left this fire, uh, he said the policy of the Fire Department is to go through and throw everything out anyway, and Government Exhibit No. 9 shows the condition—excuse me. No. 13, shows the condition of this room clearly when they were there at the time; it's a hodge-podge; there's debris all over the floor.

So, to require an officer to leave the scene of a burning building, or a building that had been burning, I just don't think is reasonable under the circumstances and the officers have to make that decision at the time; they can't wait and weigh the legal requirements of what's going to happen while

they go to get it; they had to make a decision at the time to go ahead and seize these records

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because it looked to them like arson records to be seized. Uh, it's just not reasonable to expect that they should have to do that.

BY THE COURT: Well, gentlemen, let me say this; I agree with the Government's position about it, with the further observation that this was, from these photographs, a very serious fire and one capable of vast destruction and these men fought this fire—from the official records, from some 8:20 in the morning until 2:30—no, 1:30 or 2:00 in the afternoon before they left the scene.

And, when you consider that damage from water could have occurred to these records, it just doesn't seem reasonable to me to require the Fire Department, in the midst of this situation, with seventy-five firemen on the job and fifteen pieces of equipment in the street, to have to cease their operation and go down to the courthouse and find somebody on Saturday morning to get a search warrant issued and come back and get these records.

Accordingly, I hold that it is not necessary to reach Point Two, and make a determination of that because I feel that the exigencies of the situation justified the decision that was made at the time by Captain Foushee and the police sergeant.

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So, I would order the conviction to stand. Now, I would like to point out one thing that I want to have some agreement with you gentlemen about; it appears to me that the issue of the validity of this search, this fire having occurred in March of 1969, does not affect the validity of the convictions under Counts Eight, Nine, Ten, Eleven, Twelve, Thirteen, Fourteen and Fifteen of the Indictment, because the

documents upon which the Government based its charges here against the Defendant were not, under any condition, involved in this fire.

Now, I want to be certain that we are all in agreement about that.

MR. HADDAD: I'm not in agreement with that. I want to be certain the Record is clear on that.

BY THE COURT: Well, why aren't you? I want the Appellate Court to understand why not because Count Eight of that Indictment charges that on or about the 30th of June, 1969, he did wilfully and knowingly attempt to evade and defeat part of the Federal Excise Tax on wagers accepted during the month of April, 1969. Now, do you maintain that those records—they were not even in existenc[illegible] at the time of the fire in March.

MR. HADDAD: Well, let me say something to Your Honor about these last counts that

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you are speaking of; these last counts concern paltry sums of tax.

In order for there to be a conviction of an income tax evasion case there must be a substantial amount of tax included. Now, you have got indictments—or, rather, counts of, uh, here in this indictment that include Eighteen or Nineteen dollars—some of them; and, some of 'em a hundred dollars.

BY THE COURT: Well now, did you attack that on appeal?

MR. HADDAD: Yes, sir; yes, sir. I don't know on the appeal, but I mean on the original part, nor did the Government contend otherwise on the appeal, as Your Honor is contending here, that these other—they did not raise that question on the appeal about these other counts in the indictment.

BY THE COURT: Well, they got a conviction under every

one of these counts in the indictment.

MR. HADDAD: No, no; they didn't contend that if the conviction—that if the records were not admissible in this case that the convictions should stand on Counts Eight through Fifteen. They didn't raise that question during—

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BY THE COURT: (Interrupting) Well, they already had one.

MR. HADDAD: No, no.

BY THE COURT: Well, let me say this; I reach no conclusion on that. I just want to direct the Appellate Court's attention to it because the way the opinion would read, it would appear that they perhaps had not given consideration to the fact that the records that support the convictions, in my judgment, on those latter counts, were not even in existence at the time of the search and fire, and were, in fact, furnished gratuitously, or voluntarily, by Mr. Gargotto to the Internal Revenue Service, and he was convicted on all counts of the indictment and given five years on each count, to be served concurrently, for a total of five years to serve.

MR. HADDAD: With all due respect to the Appellate Court, in their consideration of this case, Judge, it was not contended by the Government that this conviction should stand on those counts in their briefs in this case. Their case was briefed, and re-briefed, and supplemental briefs and everything else.

BY THE COURT: Well, I just want the Appellate Court, when it makes its final determination, uh, final decision, either affirming me or reversing

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me, to please lay that at rest so that I have only to try the case twice and not three times.

(GENERAL LAUGHTER AT THIS POINT.)

BY THE COURT: All right, gentlemen.

(WHEREUPON, AN ADJOURNMENT WAS TAKEN AT ABOUT THE HOUR OF 4:00 P.M.)

* * * * *

No. 74-1041

UNITED STATES COURT OF APPEALS
For the Sixth Circuit

UNITED STATES OF AMERICA
Plaintiff-Appellee,

v.

ANTHONY JOSEPH GARGOTTO,
Defendant-Appellant.

AN APPEAL from the United States District Court for the Western District of Kentucky.

Decided and Filed November 19, 1974.

Before: PECK, McCREE and ENGEL, Circuit Judges.

PER CURIAM. This is an appeal from an order of the district court, entered following an evidentiary hearing held pursuant to a remand of the case by this court. *United States* v. *Gargotto,* 476 F.2d 1009 (1973).

Gargotto was convicted in district court of fifteen counts of filing false monthly wagering returns. He appealed that conviction to this court, claiming, *inter alia,* that the warrantless search of his building and the seizure of papers and documents therefrom following a fire, violated his Fourth Amendment rights. In that appeal, all issues raised by Gargotto were resolved against him, except the validity of the search as it was extended to the drawers of certain cabinets and desks, and the subsequent seizure of their contents. *United States* v. *Gargotto, supra.* This court was of the opinion that there was insufficient evidence on the record to determine whether the warrantless search was justified by the exigent circumstances exception to the Fourth Amendment warrant requirement, *Coolidge* v. *New Hampshire,* 403

U.S. 443 (1971). The case was therefore remanded to the district court for an evidentiary hearing to determine:

> "(1) whether the exigencies of the situation were such at the time the search was extended to the drawers of the desks and cabinets to justify such search and seizure of the contents, without a warrant, and if no such justification is found,
>
> (2) whether the papers found in plain view can be identified and segregated from those that were removed from the drawers." *United States* v. *Gargotto, supra,* at 1014-5.

In remanding the case, this court stated that "the results of the hearing will determine whether or not a new trial is required."

Upon remand, a hearing was held, following which an order was entered, accompanied by findings of fact, in which it was determined that the requisite exigent circumstances were present to justify the warrantless search. Gargotto appeals from that order. We affirm.

Because the facts were fully set forth in the earlier appeal, we recite them only briefly here. A fire occurred in a building owned by Gargotto, and arson was suspected. Two officers, one a captain of the Arson Squad and one a detective on the police force, came upon the scene and entered the building. The fire was under control, but firefighters were still present in substantial numbers and were working to prevent further outbreak of the fire. The officers viewed certain papers and documents on the floor in plain view and seized them, suspecting that they might provide evidence of motive in the arson. The papers appeared to be gambling documents. The officers thereupon continued their search to areas not in plain view, drawers of cabinets and desks, in which they found and removed more papers. The papers were taken to police headquarters. That afternoon a suspect was apprehended and charged with the arson, and the papers were no longer

needed in that investigation. They were, however turned over to federal agents who examined them, conducted an investigation, and eventually charged appellant with the offenses of which he was convicted in this case.

In this appeal, we are not concerned with the seizure of documents in plain view, nor the release of documents to federal agents. Nor are we faced with the question of whether there existed probable cause to search for the seized evidence at the premises. These questions were resolved by the earlier appeal. We are here concerned only with whether the officers were faced with such circumstances, amounting to an emergency, which made the seeking and obtaining of warrant unfeasible, and hence unnecessary.

The district judge, as directed by this court, made findings in this regard. His findings must be accepted by this court unless they are clearly erroneous. See *Davis* v. *United States*, 328 U.S. 582 (1946). Appellant claims that certain of the trial judge's findings were clearly erroneous and that his conclusion was therefore improper and should be reversed. We disagree. The material facts as found by the trial judge are supported by the evidence and are not clearly erroneous. We conclude on those findings, that exigent circumstances were present and the search and seizure were justified. *Coolidge, supra.*

The court found that at the time of the search, firemen were in the process of chopping walls, hosing the area with water and discarding flammable materials. The court determined that there would be a real danger of water damage and possible loss or destruction of the desired evidence were the officers to take the time to obtain a warrant. These findings are not clearly erroneous. In our view, they are sufficient to justify the warrantless search and seizure. We reject appellant's claim that the captain could have ordered firemen to maintain the status quo while they sought a warrant, in light of his expert testimony that the actions of the firemen were necessary to prevent further outbreak of the

fire. We do not believe that the Fourth Amendment requires that good firefighting techniques necessary for the protection of person and property must be sacrificed in order that the premises of the fire may be searched for evidence relating to arson, where probable cause exists. The exceptions to the Fourth Amendment warrant requirements attempt to strike a balance between the competing needs of society, and we agree with the trial court that the government succeeded in showing here that the balance was struck in favor of a warrantless search.

While appellant contends that the trial court erred in finding that the firemen were in the process of "actively extinguishing the flames," and erred in finding that the officers believed that the papers might have provided evidence of how the fire started, we conclude that these findings, even if erroneous, do not compel reversal. The crucial issue was whether the situation as a whole was such that an emergency existed. Any finding with regard to the intended use of the papers goes to probable cause, previously held to exist by this court, and is hence irrelevant. Moreover, in our judgment an emergency existed with respect to the preservation of the needed evidence, regardless of whether the flames were still live or had been extinguished, in light of the fact that active and necessary firefighting procedures continued to take place which could reasonably have been found to threaten destruction of the evidence. If the trial judge's finding that flames were still present was erroneous, we conclude that it was not a necessary finding to the determination of the issue remanded by this court, and hence, was harmless. Federal Rules of Crim. Procedure 52. See also, *J. P. Gibbons* v. *Utah Home Fire Insurance Co.*, 202 F.2d 469 (10th Cir. 1953). In view of the concurring threat of water damage and loss due to the discarding of flammable materials, it is irrelevant whether there was in addition a threat of destruction due to fire itself. It is sufficient if facts material to a finding of exigent circumstances are found by the trial court and are supported by

the evidence. We conclude that such was the case here, and that the conclusion of the district judge was correct.

In light of the fact that exigent circumstances were found, the trial judge was not required by the order of remand to decide the contingent question of whether the documents could be segregated, and he did not do so. Likewise, we need not reach it here, since we conclude that the seizure of all documents involved was valid.

Appellant also attempts, through his brief, to re-raise issues previously decided by this court in *United States* v. *Gargotto, supra.* No petition for rehearing was filed with this court following the judgment entered on April 24, 1973. In the absence of such a petition, those issues cannot be reconsidered. Federal Rules of Appellate Procedure 40. This appeal is from an order of the district court directed to a single issue. Our review here must be limited to the errors assigned with respect to the order appealed from.

Affirmed.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA *Plaintiff-Appellee*

v.

ANTHONY JOSEPH GARGOTTO, *Defendant-Appellant*

ORDER

Before: PECK, McCREE and ENGEL, Circuit Judges

This cause came on for hearing on the petition for rehearing with a suggestion that it be reheard in banc.

It appearing to the court that no judge has requested that a vote be taken on said suggestion, the petition for rehearing was considered by the panel and was determined not to be well taken.

It is therefore ORDERED that the petition for rehearing be denied.

ENTERED BY ORDER OF THE COURT

/s/ John P. Helman
Clerk

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1019

ANTHONY JOSEPH GARGOTTO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The first opinion of the court of appeals is reported at 476 F.2d 1069. After a remand by the court of appeals, the district court conducted an evidentiary hearing and issued a written order and findings of fact (Pet. App. 67a-70a). The court of appeals affirmed the district court's order (Pet. App. 134a-138a; 510 F.2d 409).

JURISDICTION

The judgment of the court of appeals was entered on November 19, 1974, and a petition for rehearing *en banc* was denied on January 15, 1975 (Pet. App. 139a). The petition for a writ of certiorari was filed on February 14, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether state officers violated the Fourth Amendment by seizing petitioner's gambling records during the course of an arson investigation in a building owned by him that had burned.

2. Whether agents of the Internal Revenue Service were required to obtain a warrant before examining and copying the gambling records while they were in the possession of the local police.

3. Whether introduction of the gambling records as evidence at petitioner's trial violated his Fifth Amendment privilege against self-incrimination.

STATEMENT

Following a jury trial in the United States District Court for the Western District of Kentucky, petitioner was convicted on thirteen counts of filing false wagering excise tax returns and two counts of failing to file such returns, in violation of 26 U.S.C. 7201. He was sentenced to a five-year term of imprisonment on each count, the sentences to run concurrently. On appeal, the court of appeals, while

generally upholding the search and seizure of petitioner's gambling records (of which more hereafter), remanded the case to the district court for a limited evidentiary hearing in regard to one aspect of the search. The hearing was held on October 25, 1973 (Pet. App. 70a-133a). On November 30, 1973, the district court issued a written order and found facts supporting the conclusion that, given the exigencies of the situation, the warrantless seizure of petitioner's gambling records was lawful (Pet. App. 67a-70a). In light of the district court's findings, the court of appeals affirmed petitioner's convictions (Pet. App. 134a-138a) and subsequently denied a petition for rehearing (Pet. App. 139a).

As set forth in the first opinion of the court of appeals (476 F.2d at 1010-1012), the evidence at trial showed that petitioner owned a three-story building in Louisville, Kentucky. The first floor housed a movie theater; the second and third floors were used for a gambling operation where bets were taken on horse races and other sporting events. At approximately 8:00 a.m. on March 22, 1969, a fire was discovered in petitioner's building, and a number of units of the Louisville Fire Department responded to the alarm. At approximately 8:20 a.m., the commanding officer at the fire, suspecting arson, called Lieutenant William Foushee, an arson investigator, and requested him to come to the scene. Foushee arrived 25 to 30 minutes later. At that time the fire appeared to have been extinguished, but the

equipment and fire fighters were still on the scene, and firemen continued to work inside the building.

Shortly after his arrival, Foushee noticed Detective John Aubrey of the Intelligence Division of the Louisville Police Department (who had seen the fire on his way to work), and requested his assistance in the arson investigation. Having been advised that the fire originated above the first floor, Foushee and Aubrey went to the second floor. It was immediately obvious to them that there were numerous separate and unrelated fires. As they reached the top of the front stairway, they found sharp burn patterns, indicating that some flammable liquid had been used to set the fire. In at least one room on the second floor and also on the third floor, trash appeared to have been set on fire. As the court of appeals described the ensuing events:

> The two investigators noticed a number of papers scattered on the floor of both the second and third floor rooms. Some of the papers appeared to have been scattered out on the floor by the stream of water from hoses of the firemen and these were placed in a fire fighter's coat which was spread on the floor. In addition to the papers on the floor, Lieutenant Foushee directed Detective Aubrey to remove papers from cabinets which were located in the various rooms on the second and third floors. The papers from the different rooms were commingled, and those taken from the cabinets were commingled with the papers picked up from the floor. Although some of the papers were wet and a few were scorched, there was no evidence that flammable

> liquids or other fire accelerants had been applied to any of the papers which were collected by the investigators. Lieutenant Foushee said that he realized the papers were records of some sort but that he did not take the time to study them that day. Detective Aubrey said that he thought he recognized the papers as containing betting records, but that he did not advise Lieutenant Foushee of this. * * * [476 F.2d at 1011.]

Foushee testified at trial and at the evidentiary hearing that the records were seized as possible evidence of motive and identity of the arsonist (I Tr. 78-79, 81; Pet. App. 73a-74a)[1]: "Since we were unaware at this point as to who may have set the fire or what might be behind this setting of the fire I felt it necessary to remove any evidence that we could find, which included records" (I Tr. 81). He further testified at the evidentiary hearing that the drawers to the file cabinets on the second floor were open when he arrived there and that they had probably been opened by the firemen during their "overhaul" procedures (Pet. App. 87a-89a).[2]

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[1] References to the trial transcript are to volume and page. References to the proceedings at the evidentiary hearing on remand are to petitioner's appendix, filed in this Court.

[2] He explained that "overhaul" involves the steps taken after a fire has been extinguished to prevent further outbreaks of fire. It involves such things as pulling ceilings down, opening walls, and opening and checking other areas (such as closets, desks, cabinets and books) where sparks or hot spots might still exist. During this process, firemen often take flammable debris, including papers and records, out of the building and hose them down with water (Pet. App. 86a-90a).

All of the records taken from the second and third floors[3] were bundled up in a fire fighter's coat and taken by Foushee and Aubrey to Aubrey's office at police headquarters. There the two investigators looked at the papers briefly (Aubrey noticing again that they were betting records) and locked them in a room. Foushee then returned to the scene of the fire. Later that afternoon a suspect other than petitioner was arrested and charged with arson. Foushee never examined the papers to determine whether they might furnish evidence of a motive for the fire.

On the day after the fire, Aubrey called an agent in the Intelligence Section of the Internal Revenue Service and advised him that he might be interested in looking at the records. Two agents of the Internal Revenue Service thereupon contacted Foushee and received his permission to examine the records. The next day they went to Aubrey's office and microfilmed the records.

About one week after the fire, and several days after the IRS inspection, the records were delivered to the office of the Commonwealth Attorney, where petitioner appeared and demanded their return.[4]

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[3] Foushee testified at the evidentiary hearing that he did not recall a filing cabinet on the third floor and that the records taken from the third floor had all been lying on the floor (Pet. App. 90a).

[4] Although petitioner had been at the scene of the fire, he had not been informed that papers had been removed from the second and third floors (I Tr. 85).

ARGUMENT

1. Petitioner contends (Pet. 6-13) that the warrentless seizure of his gambling records was not justified by the "plain view" exception to the Fourth Amendment's warrant requirement. He argues that under a portion of the opinion in *Coolidge* v. *New Hampshire*, 403 U.S. 443, 464-473, representing the views of four of the nine members of the Court, there are three requirements for the plain view exception: a right to be in the place from which the seizure is made; an inadvertent discovery of the evidence seized; and a discovery of evidence that is incriminating. While petitioner concedes, as he must, that the first requirement is met because the initial entry into his building was justified by the fire (Pet. 12),[5] he nevertheless argues that the discovery of the records was not inadvertent (Pet. 7-8) and that—because the officers did not know the papers seized were gambling records—the evidence was not incriminating to

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[5] Under the relevant statutes of the Commonwealth of Kentucky, Lieutenant Foushee, as an arson investigator for the fire department, had the duty and the power to enter petitioner's building to investigate the cause and circumstances of the fire for the purpose of detecting arson and related offenses. Ky. Rev. Stat. §§ 227.220(2)(a), 227.240 (1973 Repl.). No warrant is required in such circumstances since "[t]he need to investigate promptly for the cause of the fire is very much interrelated with the necessity of suppressing the blaze." *Steigler* v. *Anderson*, 496 F.2d 793, 797 (C.A. 3). See also, *Bailey* v. *People of the State of Michigan*, 493 F.2d 1218, 1220 (C.A. 6), certiorari denied, 419 U.S. 858; *United States* v. *Green*, 474 F.2d 1385, 1389 (C.A. 5), certiorari denied, 414 U.S. 829.

petitioner within the meaning of *Coolidge* (Pet. 8-12).

Petitioner's characterization of the activities of Foushee and Aubrey as a "'planned' warrantless search" (Pet. 8), rather than an inadvertent discovery of evidence, is misleading. The investigators did not enter the building for the purpose of searching for and seizing gambling records or any other papers (I Tr. 127-128). Indeed, there is nothing to indicate that they were aware of the presence of any papers in the building until after they had entered the second floor room and saw papers strewn over the floor. Having properly entered the building, the investigators discovered evidence of arson, which justified their further immediate investigation for the possible causes of and motive for the arson. During this legitimate investigation, the records on the floors and in the partially opened drawers of cabinets were "inadvertently" observed in open view and were therefore properly seized.*

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* The record in the present case demonstrates that there were exigent circumstances (see, *e.g.*, *Warden* v. *Hayden*, 387 U.S. 294, 298) justifying the warrantless entry of the building and the subsequent warrantless search for evidence of arson and seizure of petitioner's records.

As the investigators reached the top of the stairway leading to the second floor they found physical evidence in the nature of sharp burn patterns which indicated that the fire had been set by a flammable liquid. Further evidence of arson was indicated by the separate trash fires set on the second and third floors. Upon entering a second floor room the investigators noticed papers strewn on the floor, apparently scattered about by the hose streams (Pet. App. 87a). On the basis of his experience as an arson investigator, Foushee realized that such

The "inadvertence" requirement announced in *Coolidge* was intended to prevent police from using the "plain view" doctrine as a method of seizing evidence that, prior to the entry, they knew was on the premises. Thus, the plurality opinion in *Coolidge* states: "where the discovery is anticipated, where the police know in advance the location of the evidence and intend to seize it," there is no reason why they should not be required to obtain in advance a search warrant for that particular evidence. 403 U.S. at 470. By contrast, the officers here did not know of the existence of the gambling records before they properly entered petitioner's building, and petitioner has not argued otherwise. Their discovery of this evidence therefore was "inadvertent."

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papers and records are often evidence of a motive to commit arson. Assisted by Aubrey, he therefore collected the papers on the floor and those contained in the file cabinets, whose drawers had been opened by the firemen in their search for "sparks" and "hot spots" (Pet. App. 73a-74a, 87a-89a). Foushee testified that it was necessary to seize the papers immediately in order to prevent their destruction by the firemen according to their normal procedures (Pet. App. 89a-90a). In fact, some of the papers were already wet and scorched (Pet. App. 91a, 116a).

Foushee thus had cause to believe that arson had been committed, and his experience as an arson investigator led him reasonably to believe that the records were evidence of the crime. Cf. *United States* v. *Walling*, 486 F.2d 229, 236 (C.A. 9), certiorari denied, 415 U.S. 923. Given the existence of these exigent circumstances, it was unnecessary and indeed, would have been unreasonable, for Foushee to have attempted to stop the firefighting operations to secure a warrant. See *Warden* v. *Hayden, supra; Schmerber* v. *California*, 384 U.S. 757, 770-771.

Petitioner also argues that because the officers did not know that the papers were gambling records, the papers were not incriminating and therefore could not be seized under the "plain view" exception. But this suggests that an otherwise lawful seizure of evidence believed relevant to one offense—here arson—is transformed into a violation of the Fourth Amendment if it later turns out that the seized evidence incriminates the defendant in regard to a different offense. This Court has never adopted such a rule, and petitioner offers no reason why it should. "[A] search is not to be made legal"—or illegal—"by what it turns up. In law it is good or bad when it starts and does not change character from its success." *United States* v. *Di Re*, 332 U.S. 581, 595. In this case, the officers reasonably believed that the records could be evidence of arson—the crime under investigation—and they were therefore justified in seizing them. See *Steigler* v. *Anderson*, *supra*, 496 F.2d at 795-796; *United States* v. *Green*, *supra*, 474 F.2d at 1389. Moreover, as we pointed out above (note 6, *supra*), it was necessary to take custody of the papers immediately in order to prevent their possible destruction by firemen following normal procedures (some of the papers were already wet and scorched).

2. Petitioner contends (Pet. 13-22) that agents of the Internal Revenue Service had to obtain a search warrant before looking at the records being held by the local police and that their failure to do so constituted an unreasonable search.

As we have demonstrated, petitioner's records were lawfully seized by Foushee and Aubrey. The retention of the records and their transmission to another law enforcement agency did not constitute a separate search or seizure requiring the demonstration of probable cause or the acquisition of a warrant as a condition precedent.[7] No greater or additional intrusion on petitioner's privacy occurred when the Internal Revenue agents examined the records. Nor is there any indication in the record that the actions of Foushee and Aubrey, in investigating the arson and seizing possible evidence of that offense, were merely a subterfuge to search for evidence of illegal gambling operations (I Tr. 127-128). See *Gurleski* v. *United States*, 405 F.2d 253, 258 (C.A. 5), certiorari denied *sub nom. Smith* v. *United States*, 395 U.S. 977. Thus, as the court of appeals correctly held (476 F.2d at 1014):

> Evidence legally obtained by one police agency may be made available to other such agencies without a warrant, even for a use different from that which it was originally taken. *Gullett* v. *United States*, 387 F.2d 307 (8th Cir. 1967), cert. denied, 390 U.S. 1044, 88 S.Ct. 1645, 20 L.Ed. 2d 307 (1968).

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[7] Even assuming *arguendo* that probable cause was required, Detective Aubrey did have cause to believe that the records seized were gambling records and thus constituted evidence of possible violations of Ky. Rev. Stat. §§ 436.440 and 436.490 (1969) (repealed July 1, 1974), which made it unlawful to keep premises where wagering on horse races is done and to engage in the business of accepting such wagers.

See also *United States* v. *Coronna*, 420 F.2d 1091 (C.A. 5); *United States* v. *Scolnick*, 392 F.2d 320 (C.A. 3), certiorari denied *sub nom. Brooks* v. *United States*, 392 U.S. 931.[8]

3. Petitioner also contends (Pet. 22-28) that even if his gambling records were lawfully seized, the records were testimonial in nature and therefore barred from production at trial by his Fifth Amendment privilege against self-incrimination.

The Fifth Amendment's command that "[n]o person * * * shall be *compelled* in any criminal case to be a witness against himself" (emphasis supplied) pro-

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[8] Petitioner (Pet. 15-17) cites *United States* v. *Birrell*, 470 F.2d 113 (C.A. 2)—which was "determined on its peculiar facts" (470 F.2d at 117)—as standing for a contrary rule. In that case, state officers removed certain papers from an apartment whose occupant had been murdered. Shortly thereafter Birrell notified the police that the papers were his and demanded their return. Before the police had returned the papers, federal officers requested and were granted permission to examine Birrell's papers in connection with a perjury investigation of him. The court held that although the police were justified in retaining Birrell's papers for a reasonable time, "Birrell had sufficiently manifested his claim that a search by law enforcement officers of another sovereign for a different purpose could not be made without a warrant." *Ibid.*

However, the court recognized that if the police, on their own initiative, had given the papers to the federal officers "there would have been no federal seizure" and a different result might be reached. *Ibid.* That, of course, is what happened in this case, and *Birrell* therefore is not in conflict with the decision below.

United States v. *Soriano*, 482 F.2d 469 (C.A. 5), cited by petitioner (Pet. 20), was reversed after a rehearing *en banc*. 497 F.2d 147 (C.A. 5).

tects against the "forcible and compulsory extortion" of information from the accused himself. *Boyd* v. *United States*, 116 U.S. 616, 630. See also *Couch* v. *United States*, 409 U.S. 322, 328. Here, petitioner was not "compelled" in the Fifth Amendment sense to produce any information against his will: the records at issue already were in the hands of the authorities, having been lawfully seized by them. No legitimate value underlying the Fifth Amendment privilege would be served by denying the government their use at trial.[9] The records were incriminating,

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[9] While papers were involved in this case, as in *Boyd*, there was no requirement here that petitioner authenticate the documents by producing them, thereby possibly incriminating himself by the mere act of production. Because the papers were seized rather than obtained through subpoena or summons, petitioner himself was not compelled or otherwise required to disclose, produce or authenticate them; accordingly, the Fifth Amendment is not implicated. See 8 Wigmore, *Evidence* § 2264 (McNaughton rev. 1961). As the Sixth Circuit said in *United States* v. *Blank*, 459 F.2d 383, 385, certiorari denied, 409 U.S. 887:

> We believe that there is a valid and important distinction between records sought by subpoena and records sought by search warrant. The subpoena compels the person receiving it by his own response to identify the documents delivered as the ones described in the subpoena. The search warrant involves no such element of compulsion upon an actual or potential defendant.

For this reason, *Marchetti* v. *United States*, 390 U.S. 39, and *Grosso* v. *United States*, 390 U.S. 62, relied upon by petitioner (Pet. 27), do not support his argument. Those cases involve the total failure to pay the occupational and excise taxes and to fill out the required tax forms on grounds of the privilege against self-incrimination.

but that cannot serve as a basis for excluding them from evidence. Most evidence obtained through a lawful search and seizure and later introduced at trial is incriminating.

Moreover, gambling records of the type at issue here are not the kind of material within the ambit of the Fifth Amendment privilege because they are not testimonial or so intimately personal as to enjoy the protection of the privilege. Such records contain no information of a distinctly private nature; the personal thoughts and opinions of an individual are not involved. As this Court stated in a related context in *Stanford* v. *Texas*, 379 U.S. 476, 485 n. 16: "A 'book' which is no more than a ledger of an unlawful enterprise thus might stand on a quite different constitutional footing from * * * books * * * [that reflect thoughts, opinions, beliefs, or mere predilections of their possessors]." Thus, the courts of appeals have consistently held that the seizure of records of an illegal business such as gambling and the introduction into evidence of those records do not violate the Fifth Amendment. See, *e.g.*, *United States* v. *Blank*, *supra*; *United States* v. *Hanon*, 428 F. 2d 101, 106-107 (C.A. 8), certiorari denied, 402 U.S. 952; *United States* v. *Clancy*, 276 F.2d 617, 629-631 (C.A. 7), reversed on other grounds, 365 U.S. 312; see also *United States* v. *Scharfman*, 448 F.2d 1352, 1355 (C.A. 2), certiorari denied, 405 U.S. 919. The governing constitutional standard in such situations is not the Fifth Amendment privilege against self-incrimination but the reasonableness re-

quirement of the Fourth Amendment. Cf. *Schmerber* v. *California*, 384 U.S. 757, 767. That standard, as we have shown, has been met here.

As the Sixth Circuit said in *Blank* about the seizure of gambling records (459 F.2d at 386-387):

> 1) The subjects of the seizure are not personal communications at all but rather business accounts rendered extraordinary only by the fact that the business is itself illegal.
>
> 2) These are not privately recorded and privately held thoughts or descriptions of events, as in the case of a closely held diary, but rather business records of which other persons must have knowledge. [Footnote omitted.]

The court in *Blank* therefore concluded, in language appropriate here (*id.* at 387):

> In summary we feel that appellant was not "compelled" to produce these papers in violation of the Fifth Amendment; that the papers are not communicative in nature; that the papers are business records rather than personal and private writings; and that they are on their face instrumentalities of the crime with which appellant is charged. So viewed, they are subject to seizure under [the] Fourth Amendment * * * and having been so seized, should not have been suppressed.[10]

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[10] Petitioner relies (Pet. 24-25) upon *Hill* v. *Philpott*, 445 F.2d 144 (C.A. 7), certiorari denied, 404 U.S. 991, and *Vonder Ahe* v. *Howland*, 73-1 U.S.T.C. 9333 (C.A. 9). While we disagree with *Hill*, as our certiorari petition in that case stated, the case is distinguishable. Whatever special protection might possibly be invoked under the Fifth Amendment with respect

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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MAY 1975.

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to an otherwise permissible seizure of a physician's tax records as in *Hill*, it does not follow that the business records of an illegal gambling operation are entitled to similar protection.

As to *Vonder Ahe* v. *Howland*, the opinion originally issued —upon which petitioner relies—was withheld from publication pending rehearing and ultimately was withdrawn. On rehearing, the Ninth Circuit held that "appellant's Fifth Amendment contention is premature. Resolution will depend upon facts and developments not before us at this time." *Vonder Ahe* v. *Howland*, 508 F.2d 364, 371.

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